5-29-2012

Hatheway v. Board of Regents of the University of Idaho Appellant's Brief Dckt. 39507

IN THE SUPREME COURT OF THE STATE OF IDAHO

LILLIAN HATHEWAY, Appellant, vs. BOARD OF REGENTS OF THE UNIVERSITY OF IDAHO, AND UNIVERSITY OF IDAHO, Respondents.	Docket No. 39507-2012 District Court No: CV 08-997

APPELLANT'S BRIEF

Appeal from the District Court of the Second Judicial District
of the State of Idaho, in and for the County of Latah,

THE HONORABLE JEFF M. BRUDIE, DISTRICT JUDGE, PRESIDING

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A. Nature of the Case.

Lillian Hatheway sued her employer, the University of Idaho, for age discrimination, hostile work environment, retaliation, constructive discharge and negligent infliction of emotional distress. Ms. Hatheway, a 61-year-old Administrative Assistant in the English Department, was forced from her job after an express policy change at the University to recruit young entry level employees to replace older workers, despite her previous exemplary reviews as an "outstanding employee." Her work conditions dramatically worsened after complaining to the University and the Human Rights Commission, which ultimately resulted in her departure and this lawsuit. Despite Ms. Hatheway's evidence of the new "age" policy at the University, direct comments and conduct from her supervisors relating to ageist attitudes towards her, and the temporal connection with a drastic about-face on her employment evaluations and treatment, the trial court impermissibly weighed the evidence and dismissed all of Ms. Hatheway's claims on summary judgment. This appeal follows.

B. Course of the Proceedings in the Hearing Below and its Disposition.

On October 22, 2008, Plaintiff-Appellant Lillian Hatheway filed a Complaint and Demand for Jury Trial against the Board of Regents of the University of Idaho, and the University of Idaho, alleging four causes of action (which the District Court broke out into five separate claims in its Opinion and Order on Defendants' Motion for Summary Judgment): (1) age discrimination and hostile work environment under state law (the Idaho Human Rights

Act); (2) unlawful retaliation under state law (the Idaho Human Rights Act); (3) constructive discharge; and (4) negligent infliction of emotional distress.

Following extensive discovery in this case, on August 18, 2011, the University of Idaho filed a Motion for Summary Judgment, seeking dismissal of all of Ms. Hatheway's claims. In response, Ms. Hatheway responded to the University's Motion for Summary Judgment, submitting supporting affidavits from herself and Dr. Richard K. Howe, as well as deposition testimony of Pamela Yenser, Kurt Olsson, Gordon Thomas, Robert Wrigley, Gary Williams, Steve Chandler, Mary Blew, Mary Ann Judge, Ronald McFarland, and Jeffrey Jones. Ms. Hatheway also brought forward discovery answers and responses from the University of Idaho, as well as relevant documents including but not limited to her annual evaluations, e-mails, and handwritten notes Ms. Hatheway took contemporaneously during her employment. She presented evidence as outlined below on her employment history, the abrupt about-face on her performance the University took after its new "youth" policy was announced, and direct evidence of negative comments and conduct of her superiors, all of which were temporally connected to the new policy, and which were unconnected to her previously lauded performance.

Despite Plaintiff's evidence, on November 10, 2011, District Court Judge Brudie issued his written Opinion and Order granting the University's Motion for Summary Judgment holding:

Age Discrimination Claim

> [T]he Court must consider the third element of an age discrimination claim, which requires a showing by Plaintiff that she was discharged or was subjected to adverse decisions by her employer and, but for her age, the discharge or adverse decisions would not have occurred. Defendants contend

this element has not been met and is dispositive of her claim. The Court agrees.

(R. Vol. III, p. 679)

Plaintiff Hatheway has failed to demonstrate she was constructively discharged or received disparate treatment.

(R. Vol. III, p. 681)

[T]he Court is unable to find that a reasonable trier of fact could find she was driven from the workplace or that her age played any role in her performance evaluations.

(R. Vol. III, p. 682)

Ms. Hatheway has simply failed to demonstrate that age was a factor driving Dr. Olsson's actions as required in order to establish a prima facie claim for age discrimination.

(R. Vol. III, p. 683)

Hostile Work Environment Claim

Ms. Hatheway has failed to demonstrate that she was subjected to age discrimination and, therefore, has failed to demonstrate that her workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive as to alter the conditions of her employment.

The Court, after considering the record as a whole, is unable to find either subjectively or objectively that a hostile work environment was created as a result of age discrimination.

(R. Vol. III, p. 684)

Unlawful Retaliation Claim

There is no evidence no evidence that the University retaliated against her because she engage in protected activities.

(R. Vol. III, p. 685)

Constructive Discharge Claim

> Ms. Hatheway has failed to demonstrate she was the subject of age discrimination. The absence of such a showing is fatal to her claim for constructive discharged [sic] based on age discrimination.

(R. Vol. III, p. 686)

Negligent Infliction of Emotional Distress Claim

> Ms. Hatheway has failed to demonstrate the Defendants breached a duty owed to her. There being no breach of duty shown, Ms. Hatheway's claim for negligent infliction of emotional distress thereby fails.

(R. Vol. III, p. 686)

In so holding, the District Court improperly applied the standards of review for a discrimination claim on summary judgment, and improperly granted the University's Motion for Summary Judgment, dismissing all of Ms. Hatheway's claims. Ms. Hatheway is appealing the District Court's grant of complete summary judgment, and requests that the Idaho Supreme Court reverse the District Court's opinion and order.

C. Facts.

The relevant facts of this case on appeal, presented in chronological order, establish that genuine issues of fact exist which preclude summary dismissal of Ms. Hatheway's claims.

1. From November of 1999 to June 30, 2005, Ms. Hatheway was viewed as an "outstanding" employee.

In November of 1999, Ms. Hatheway accepted a position as an Administrative Assistant II with the University of Idaho, College of Letters and Science, Dean's Office in Moscow, Idaho. (R. Vol. II, pp. 302-303) Ms. Hatheway held this position until approximately

September 2002, when she accepted a lateral transfer within the University to an Administrative Assistant II position with the Department of English. Ms. Hatheway was employed in that capacity with the Department of English until she was essentially forced to retire on September 12, 2008. (R. Vol. III, p. 519, L. 4-8)

During her time at the University of Idaho, other than Dr. Olsson, all other University of Idaho employees and faculty and/or administrators who provided testimony and/or evidence in this case stated that they had never had any issues with Ms. Hatheway's honesty or reason to call into question the truthfulness or veracity of Ms. Hatheway. They all generally testified that Ms. Hatheway was an honest and pleasant woman. (R. Vol. II, pp. 449, 453, 470, 473, 431-432, 479-480, 486-487, 491, 492-493, 497-498 and 502-503)

In Ms. Hatheway's employment capacity as an Administrative Assistant II for the University's Department of English, her supervisor was the Chair of the English Department at the University. It was this individual's duty and job responsibility to assess Ms. Hatheway's job and work performance and to provide her with her annual evaluation (and any disciplinary actions). (R. Vol. III, p. 519, L. 9-14)

In her first year with the Department of English at the University, Ms. Hatheway received an overall very positive, "Exceeds Requirements" annual review from the Chair at that time, Dr. David Barber. Ms. Hatheway received no negative marks or comments. Ultimately, Dr. Barber ended his evaluation by stating that "Lillian is a team player and a wonderful asset to the college." (R. Vol. II, p. 294, L. 10-14, pp. 335 and 348-353)

In her second year with the Department, Dr. Barber rated Ms. Hatheway's overall annual performance as "Outstanding," the very best score possible. Dr. Barber stated in that review, in part, that "Lillian is one of the best things to happen to the English Department in a long time" and "She's a real find for us. Thank you, Dean Zeller!" (R. Vol. II, p. 294, L. 14-18, pp. 336 and 354-360)

For Ms. Hatheway's third year review while with the Department, Dr. Barber again rated Ms. Hatheway's overall annual performance as "Outstanding." Dr. Barber stated in the review, in part, that "Lillian has been a wonderful asset to the English department this past year," and that Ms. Hatheway was a wonderful "team player." (R. Vol. II, p. 294, L. 19-23, pp. 336 and 360-365) Dr. Barber ended the review by commenting that "[t]he English department has grown to depend on Lily and it would be a great loss should she ever leave." (R. Vol. II, p. 294, L. 19-23, pp. 336 and 360-365)

On or about March 2, 2005, Ms. Hatheway received her last annual review from Dr. Barber. Ms. Hatheway again received an overall "Outstanding" review as she had the two previous years. In pertinent parts of that review, Dr. Barber commented that Ms. Hatheway

> demonstrates a strongly positive attitude that greatly enhances the atmosphere in the departmental office...overall her civility one of her great assets...Lillian never wavered in working to produce a positive overall atmosphere.

(R. Vol. II, pp. 294-295, L. 24-2, pp. 336 and 366-371)

2. Ms. Hatheway was continued to be viewed as an "outstanding" employee, irrespective of her concern regarding an issue of unfair pay differential with a new younger employee.

On or about July 1, 2005, the University employed Dr. Kurt Olsson to replace Dr. Barber as Chair of the Department of English. (R. Vol. II, pp. 403 and 407-408) This meant that Dr. Olsson was now Ms. Hatheway's new supervisor. Dr. Olsson was the Chair of the English Department and Ms. Hatheway's supervisor for the remainder of Ms. Hatheway's employment with the University. During Dr. Olsson's tenure as the Chair of the English Department, according to his colleagues, Dr. Olsson was "kind of secretive in how he r[an] things" as the Department Chair. (R. Vol. II, p.p. 431 and 434) As of 2009, Dr. Olsson is no longer employed by the University of Idaho. (R. Vol. II, pp. 403-404)

Shortly after Dr. Olsson came on-board as the Chair in or around September 2005, with the assistance and *support* of Ms. Hatheway, Dr. Olsson hired Ms. Deborah Allen for the position of Financial Technician to the Department of English. (R. Vol. II, pp. 300, 310, 403 and 409) Ms. Allen was being paid more than Ms. Hatheway, despite the identical pay grade with Ms. Hatheway, and Ms. Hatheway's higher "Hay Point"[1] rating and longer tenure. (R. Vol. II, pp. 300 and 310 and p. 319) Ms. Hatheway approached Dr. Olsson and other University officials several times regarding the pay rate differential between herself and Ms. Allen's position, expressing concern that she was being subjected to age discrimination. (R. Vol. II, pp. 300, 310-

[1] The Hay Point factor analysis is a method of job measurement used to establish the relative significance of jobs as they fit within an organization. At the University of Idaho, it is a way the University establishes pay grades for classified employees. Ms. Hatheway, whose job required knowledge of and how to interpret University policies and procedures, states that Hay points means that your job is considered a little more difficult and is a scale for the University to determine pay. (R. Vol. II, pp. 300 and 310)

312) Ms. Hatheway's complaint was not about Ms. Allen as a person, it was about the fact that the Financial Tech position, with less "Hay Points," and who was younger with less tenure at the University was making more money. (R. Vol. II, pp. 300 and 309)

Regardless of her inquiries or concerns about this issue, Ms. Hatheway's initial professional relationship with Ms. Allen was not soured as a result of this issue.[2] (R. Vol. II, pp. 300 and 311) And Ms. Hatheway continued to be considered an excellent employee. In fact, in or around April 2006, Ms. Hatheway was nominated for the University of Idaho Outstanding Employee Award, for the year, by Associate Professor and Director of Undergraduate Studies for the Department of English, Dr. Walter A. Hesford. (R. Vol. III, p. 519, L. 15-21) In Professor Hesford's nomination letter, he wrote of Ms. Hatheway: "Lillian is the administrative heart of the Department of English. Her skills and warmth are essential to the well-being of our faculty and students. She goes far beyond the call of duty to serve and bring us together." (R. Vol. III, p. 519, L. 15-21, pp. 597-598) In March of 2006, Ms. Hatheway also received another outstanding performance evaluation. (R. Vol. II, p. 411, L. 7-10)

3. On May 1, 2006, former University of Idaho President, Mr. Timothy P. White gave his State of the University Address urging older University employees to "get out of the way" and "retire" to help the University recruit "young entry-level" individuals.

Shortly after receiving her outstanding evaluation and this nomination, on or about May 1, 2006, then University of Idaho President, Timothy P. White, gave a "State of the University" address. While Ms. Hatheway was not present for the speech live, she later went to the

[2] In fact, Ms. Hatheway testified that she did not have a problem with Ms. Allen as a person. (R. Vol. II, pp. 300 and 329)

University's website and listened to a recording of it. (R. Vol. II, pp. 300 and 313-314) In that speech, President White indicated that some of the staff at the school needed to seriously consider retirement. President White stated, in his speech, that all employees had a responsibility, individually and collectively, to retire, and that to help the University recruit young entry-level or mid-career persons, because "it is time to get out of the way." (R. Vol. III, p. p. 519, L. 21-23, pp. 600 and 611) President White further stated that he was going to ask the Deans to think about the barriers that are getting in the way of those who may want to go to a part-time appointment or to fully retire. (R. Vol. III, p. 519, L. 22-23, pp. 600-613) In hearing this speech, Ms. Hatheway recalls feeling anxious and that she felt that she was going to be on her way out of the University. (R. Vol. II, p.p. 300 and 313-315)

4. After President Timothy P. White's State of the University Address, Ms. Hatheway's work environment started to become negative and hostile.

After President White's speech, in or around the end of spring of 2006, Dr. Olsson's attitude and supervision of Ms. Hatheway changed dramatically. (R. Vol. III, p. 519, L. 24-26) From approximately August 2006, until her separation of employment in September 2008, the University and its employees started to exhibit a pattern of behavior, conduct and comments towards and/or generally about age/older workers and retirement to Ms. Hatheway that sent the message to her that due to her age, "it's time to move that girl out." (R. Vol. II, pp. 300 and 318) Dr. Olsson frequently kept his office door shut, avoided communicating with Ms. Hatheway and failed to follow-up with Ms. Hatheway on scheduled or required meetings. (R. Vol. III, p. 520, L. 1-18) Ms. Hatheway was ever increasingly isolated in the office, had her work space changed

without her knowledge while she was out of the office, was kept out of office decisions and communications that were necessary for Ms. Hatheway to be able to successfully perform her job, and had several of her primary job duties and responsibilities taken away from her. (R. Vol. III, p. 520, L. 1-18)

In Ms. Hatheway's Administrative Assistant II position with the Department of English, six of Ms. Hatheway's "Essential" responsibilities included, but were not limited to: (1) [m]maintaining an up-to-date record of donors to the English department and consulting with the chair to send out thank-you letters for gifts; keeping current in Banner Alumni module; (2) [w]orking with chair and directors to maintain the departmental Web site and (future) online departmental newsletter; (3) [u]ndertaking the periodic inventory of departmental equipment; (4) [o]rdering supplies for the copier machine, and coordinating with other administrative assistants regarding ordering of supplies generally; (5) [p]rocessing all biweekly payroll time entry and maintaining personnel sick, annual compensatory, and other time reports; and (6) [i]nterpreting, explaining, and applying department and university policies, regulations and procedures to faculty and students. (R. Vol. III, p. 520, L. 1-18 and R. Vol. II, p. 294, L. 5-9, pp. 335 and 339-347) Although those six "essential" duties and responsibilities remained in her job description, Dr. Olsson refused to allow her to perform them.

Dr. Olsson started to not communicate even pleasantries of good-morning or good-bye, and often used his office door connected to the hall instead of his office door connected to the main office to bypass Ms. Hatheway. (R. Vol. III, p. 520, L. 1-18; p. 517, L. 25-26, pp. 528-544; and p. 518, L. 18-20 and R. Vol. II, pp. 403 and 412-413)

Dr. Olsson acknowledges that Ms. Hatheway did come to him starting in 2006 with her concern that she was being kept out of the loop of communication and that he, Dr. Olsson, was not communicating to her. (R. Vol. II, pp. 403 and 414) Dr. Olsson stated that Ms. Hatheway was "upset" about the issue. However, Dr. Olsson recognized that it was appropriate for Ms. Hatheway to come to him with her concerns. (R. Vol. II, pp. 403 and 415)

5. During an English Department Faculty meeting on October 4, 2006, Dr. Olsson made comments that he would only consider "young" employees for a new position.

Five months after President White expressed the new "ageist" policy, on or about October 4, 2006, there was an English Department Faculty meeting. During this meeting there was a discussion involving Dr. Olsson in regards to the hiring for a lecturer-level position for the MFA program. (R. Vol. III, p. 520, L. 19-22) During this discussion, Dr. Olsson made disparaging remarks about older workers and expressed his desire to only hire "young and energetic" employees. (R. Vol. II, pp. 300, 316, 437 and 440)

At this meeting was Ms. Pamela Yenser, an approximately sixty-two (62) year-old part-time instructor in the Department of English, who at the time was interested in the open position. (R. Vol. II, pp. 437-439 and 441) After hearing this, Ms. Yenser addressed Dr. Olsson directly and said "[y]ou're talking about hiring a young and energetic person. What if there's somebody older and wiser and more experienced with a good resume and good qualifications? Wouldn't that person be appropriate for this position?" (R. Vol. II, pp. 437 and 440) In response, Dr. Olson answered Ms. Yenser back very quickly and said "[n]o. We're looking for someone young and energetic." (R. Vol. II, pp. 437 and 440) Dr. Olsson repeatedly made the statements

about "young and energetic" employees over and over in the meeting. (R. Vol. II, pp. 437 and 440)[3] After this meeting, Ms. Yenser relayed the events of the Faculty meeting and Dr. Olsson's age discriminatory comments to Ms. Hatheway. (R. Vol. II, pp. 300 and 317) Eventually, the individual who was hired for the lecturer-level position for the MFA program was Mr. Brandon Schrand. At the time of his hire, Mr. Schrand was thirty-six (36) years-old. (R. Vol. II, pp. 509-516)

6. Less than six months later, Ms. Hatheway began to receive negative performance evaluations from Dr. Olsson, which precluded an automatic pay raise.

In or around March 23, 2007, Ms. Hatheway received her second annual performance evaluation from her supervisor, Dr. Olsson. (R. Vol. II, p. 295, L. 9-13, pp. 383-392) This annual performance evaluation was for the rating period of 1-1-2006 to 12-31-2006. Unlike all of Ms. Hatheway's previous evaluations, in which she was rated overall as "Outstanding," suddenly this year's evaluation was very poor; although Ms. Hatheway had no "Needs Improvement" ratings on any previous evaluation, Ms. Hatheway received six (6) "Needs Improvement" ratings on her 2006 evaluation. (R. Vol. II, p. 295, L. 9-13, pp. 383 and 385-387)

Due to Ms. Hatheway receiving at least one "Needs Improvement" rating on her annual evaluation, Ms. Hatheway was eligible for being placed on probation, and more detrimentally, she was ineligible for an automatic state pay raise. (R. Vol. III, p. 518, L. 21-24, pp. 589-592; p. 519, L. 1-3, pp. 594-595 and R. Vol. II, pp. 300 and 328; 403 and 419) University policy

[3]Eight University employees, including faculty at that hearing, all testified that they had no reason to call into question or issues with Ms. Yenser's truthfulness or veracity and no reason to doubt Ms. Yenser's recollection of Dr. Olsson's statements during the meeting. (R. Vol. II, pp. 431, 433; 449, 464-465; 470 and 476; 479-481; 486, 488 and 489; 491, 494-495; 497, 499-500; 502 and 504-507)

3340A-10(d.) and other University policies and procedures provide that if a classified employee of the University, receives at least one "Needs Improvement" rating on their annual evaluation, "the employee [is] placed on 90 day probation," and are automatically ineligible for an automatic state pay raise. (R. Vol. III, p. 528, L. 21-24, pp. 589-592; p. 519, L. 10-3, pp. 594-595 and R. Vol. ; R. Vol. II, pp. 300 and 328; 403 and 419

The following day, Ms. Hatheway met with Dr. Olsson about the evaluation. When Ms. Hatheway arrived, she was surprised to find Ms. Suzanna Aaron, the University of Idaho Director of Administrative & Fiscal Operations in the room as well.[4] Not understanding the ulterior purpose for Dr. Olsson having Ms. Aaron in the room, Ms. Hatheway did not allow her to stay. After Ms. Aaron left, Ms. Hatheway requested specific instances of situations related to her performance issues stated in the evaluation, which Dr. Olsson was unable to provide. (R. Vol. III, pp. 520-521, L. 25-5, pp. 528-545; p. 518, L. 18-21, pp. 575-584) Ms. Hatheway stated, during this meeting to Dr. Olsson, that she believed that she was being discriminated based on her age. (R. Vol. II, pp. 403 and 408)

In response to this meeting, on March 16, 2007, Dr. Olsson sent April Preston, Director of Employment Services at the University, an e-mail summing up his meeting with Ms. Hatheway and stating in part

> [s]he [Ms. Hatheway] wanted names, of course, but backed off immediately when I told her I would not provide them. At one point, she touched on age discrimination, but there she backed off quickly as well. Near the end of our chat, she said we're both nearing

[4] On or about February 28, 2007, prior to this meeting and prior to even providing Ms. Hatheway with the evaluation, Dr. Olsson sent April Preston an e-mail regarding having another individual in the meeting with him who was not objective and neutral, but rather someone who simply "***may be perceived*** as neutral and objective by Lillian [Ms. Hatheway]." (R. Vol. II, p. 295, L. 9-13, pp. 393-395). Emphasis added.

> retirement and implied, I'm guessing, that she wanted to be in English for the duration. The bottom line, however, is that she said she would not sign the evaluation. I assume that doesn't tie my hands...she suggested we meet half-way, but I don't know what that means. I don't really want to change a thing.

(R. Vol. II, p. 295, L. 9-13, pp. 393-395)

When Ms. Hatheway was provided her 2006 annual evaluation, she was also given a Performance Development Plan ("PDP") by Dr. Olsson. (R. Vol. III, p. 520, L. 23-24, pp. 615-617) The PDP stated that further instances of behaviors of Ms. Hatheway, exhibited during 2006, (the year she was nominated for employee of the year) would not be tolerated. (R. Vol. II, p. 295, L. 9-13, pp. 383, 391) The PDP also stated that the PDP, together with the annual evaluation given in March, 2007, constituted a "final" verbal warning and further instances would provide grounds for disciplinary action, yet Dr. Olsson did not give Ms. Hatheway any specific examples to determine what behaviors were at issue. (R. Vol. II, p. 295, L. 9-13, pp. 383, 391) Ms. Hatheway refused to sign it because she did not agree with it. (R. Vol. II, pp. 300 and 320) And although this was alleged to be a "final warning," Ms. Hatheway had never before received any warnings, write-ups, reprimands, or negative evaluations.

Ms. Hatheway thereafter questioned Dr. Olsson on at least three more separate occasions for the reasons and/or specific instances of situations related to the alleged performance issues stated in the poor 2006 evaluation and PDP. Dr. Olsson was unable to provide Ms. Hatheway with any reasons or instances for the poor performance evaluation ratings and simply stated that Ms. Hatheway's work was "outstanding." Following Ms. Hatheway's second discussion with Dr. Olsson regarding her poor 2006 evaluation, Dr. Olsson stated that Ms. Hatheway needed to

"keep quiet and suck it up" and that she needed to "learn a lesson." (R. Vol. III, p. 521, L. 6-15) Additionally, after receiving the bad 2006 evaluation and inquiring into the factual reasons for her poor ratings, Ms. Hatheway was asked by Dr. Olsson as she was leaving for a vacation, "are you coming back?," suggesting that Dr. Olsson expected Ms. Hatheway to retire and not return. (R. Vol. III, p. 521, L. 6-15; p. 518, L. 15-17, pp. 575-584; and pp. 528-545.)

Then, sometime in April 2007, Ms. Hatheway met with Dr. Olsson and University Ombudsman, Roxanne Schreiber. (R. Vol. II, pp. 403 and 420-421) During this meeting, Ms. Hatheway again requested specific instances for performance problems to support the poor evaluation; nonetheless, again, Dr. Olsson was unable to provide any information. Instead, Dr. Olsson stated that Ms. Hatheway's work was "outstanding" and that he, Dr. Olsson, was not a communicator. During this meeting, Ms. Schreiber stated to Ms. Hatheway that there was a "slim chance that Dr. Olsson would change the evaluation," and how she should just "move on." Therefore, the meeting ended at an impasse with no answers provided to Ms. Hatheway. (R. Vol. III, pp. 562-566; p. 518, L. 18-21, pp. 575-584; and pp. 521-522, L. 19-2)

7. Despite receiving a poor evaluation, Ms. Hatheway again received a nomination for employee of the year at the University.

Even after receiving her poor evaluation and the PDP from Dr. Olsson, on or around April 6, 2007, Ms. Hatheway received notice from the University that she was again nominated for the University of Idaho Outstanding Employee Award for the year. (R. Vol. III, p. 521, L. 16-19, pp. 619-637; p. 518, L. 18-21, pp. 575-584)

8. On April 30, 2007, Ms. Hatheway filed a University of Idaho Problem Solving Request because of her unwarranted and unsupported poor annual employment review and Performance Development Plan, which worsened her treatment within the Department.

On or about April 30, 2007, Ms. Hatheway filed a Problem Solving Request Form to the University, regarding in part, "Age discrimination" and "Retaliation." (R. Vol. II, p. 295, L. 18-21, pp. 396-397) Ms. Hatheway believed that the lack of explanation of the unwarranted criticism of her performance which led to a disciplinary PDP and lack of pay raise, the continued push for "youth" as a University policy, demonstrated age discrimination.

A few weeks later, on or about May 14, 2007, Ms. Hatheway noticed that Ms. Allen had been provided with a new door to her office, allowing her the ability to shut-off Ms. Hatheway. At some point during that day, Ms. Hatheway heard Dr. Olsson and Ms. Allen discussing the door to her office. Ms. Hatheway then heard Ms. Allen state to Dr. Olsson that "the door is sending up a red flag" in regards to Ms. Hatheway. (R. Vol. III, p. 522, L. 3-7 and pp. 528-545)

Days later, on or about May 18, 2007, Ms. Hatheway had a meeting with Paul Michaud, Assistant V.P. of Human Resources, Dr. Olsson, and Dr. Nicholas Gier, the American Federation of Teachers Union President. During this meeting, again, Dr. Olsson stated that Ms. Hatheway's work was outstanding and that he was not a communicator. Lastly, Mr. Michaud stated that Ms. Hatheway's complaints of discrimination and retaliation needed to be brought to the University of Idaho Human Rights Compliance Office. (R. Vol. III, p. 522, L. 8-14 and p. 518, L. 18-21, pp. 575-584)

On June 1, 2007, Dr. Olsson provided Ms. Hatheway a response letter to their problem-solving session of May 18, 2007. (R. Vol. II, pp. 403, 422 and 428-429) In his response letter, he stated that he would not change her compensation level for the fiscal 2008 year, and that they should move forward with the PDP. Dr. Olsson ended his letter by stating that he would like to meet with Ms. Hatheway the following week to go over his letter and the PDP; however, Dr. Olsson admits that no such meeting ever occurred and they never met again about the PDP. (R. Vol. II, pp. 403, 423 and 428-429)

9. On May 30, 2007, Ms. Hatheway met with the University of Idaho Human Rights Compliance Officer, and her work environment worsened.

As a result of the unsubstantiated and unexplained evaluation and PDP, on or about May 30, 2007, Ms. Hatheway followed University policy and had her first meeting with Ms. Andreen Neukraz-Butler, the University of Idaho Human Rights Compliance Officer. During this meeting, Ms. Hatheway reported her complaint of age discrimination. (R. Vol. III, p. 522, L. 15-17)

Approximately a week later, on June 7, 2007, Ms. Hatheway overheard Dr. Olsson and Ms. Allen discussing an audit that was happening in the Department. (R. Vol. III, p. 522, L. 18-23 and p. 518, L. 1-3, pp. 547-560) During their discussion, Ms. Hatheway heard Dr. Olsson state to Ms. Allen that this was the "second go around" in regards to Ms. Hatheway, and how they were going to "replace" Ms. Hatheway. (R. Vol. III, p. 522, L. 18-23 and p. 518, L. 1-3, pp. 547-560) Dr. Olsson and Ms. Allen then discussed how the person that would replace Ms. Hatheway would do a lot of the same work as Ms. Hatheway's job. (R. Vol. III, p. 522, L.

18-23 and p. 518, L. 1-3, pp. 547-560) Dr. Olsson admits in his deposition that he received a lot of information from Ms. Allen concerning Ms. Hatheway. (R. Vol. II, pp. 403 and 426) He stated that he and Ms. Allen "had to sort through these issues [in reference to Ms. Hatheway] if we were going to get forward – get anywhere." (R. Vol. II, pp. 403 and 426)

A short time later, on or about June 27, 2007, as Dr. Olsson was preparing to leave for his annual summer vacation, Ms. Hatheway asked Dr. Olsson whether he was keeping her under surveillance. In response, Dr. Olsson admitted that he was keeping Ms. Hatheway under "continued surveillance" and watching "evidently [her] every move." (R. Vol. III, pp. 522-523, L. 24-2 and p. 518, L. 1-3, pp. 547-560) Thereafter, while Mr. Olsson was on leave for vacation, Ms. Allen repeatedly asked Ms. Hatheway when she planned to retire, and suggested that Ms. Hatheway should leave by stating to Ms. Hatheway that she would not stay in a place she wasn't wanted. (R. Vol. III, p. 523, L. 3-6 and pp. 518 and 547-560)

On or about August 1, 2007, Ms. Hatheway and Dr. Olsson had a meeting to discuss Ms. Hatheway's work environment; she specifically asked about Dr. Olsson's Faculty Meeting comments that he wanted an employee to be "young and energetic," as well as the numerous duties and tasks that were being taken away from her. Dr. Olsson admitted that he made the comment and then tried to rationalize it by stating that the employee would need to make a lot of phone calls and thus had to have "young energy." Ms. Hatheway then asked Dr. Olsson, based on what Ms. Yenser had told her, if he would consider a well-qualified experienced *older* person and he answered "no." (R. Vol. III, p. 523, L. 7-17; p. 518, L. 18-21, pp. 575-584 and p. 518, L. 1-3, pp. 547-560 and R. Vol. II. pp. 300 and 317)

Also during this meeting, Ms. Hatheway again questioned Dr. Olsson about her isolation in the office, not being informed or included in necessary communications needed to do her job, and how there had been numerous duties and tasks that he had taken away from her. Ms. Hatheway provided Dr. Olsson specific examples of duties and tasks taken away from her such as working with alumni, maintaining and creating websites, inventory tracking, and the elimination of decision to cross-train her position with the Financial Tech position. Ms. Hatheway expressed to Dr. Olsson that the treatment and hostility towards her in the office was cruel and that she would never do to a person what he was doing to her. In response, Dr. Olsson stated that he would have to rework Ms. Hatheway's job description, yet, that was apparently never completed. (R. Vol. III, p. 523, L. 18-26; p. 518. L. 18-21, pp. 575-584 and p. 518, L. 1-3, pp. 547-560)

10. On August 28, 2007, Ms. Hatheway filed a charge of discrimination and retaliation with the Idaho Human Rights Commission and her work environment further deteriorated.

As a result of the above conduct, actions and inactions, on or about August 28, 2007, Ms. Hatheway filed a charge of discrimination and retaliation against Defendant University of Idaho with the Idaho Human Rights Commission. (R. Vol. III, p. 523, L. 18-26; p. 524, L. 15-26, pp. 638-641 and p. 518, L. 1-3, pp. 547-560) Following this filing, Dr. Olsson continued to be hostile towards Ms. Hatheway, avoiding communications with her and keeping his office door closed. After filing the Human Rights charge, throughout the end of 2007 and through the winter and spring of 2008, Ms. Hatheway continued to be isolated in her job, left out of critical communications and discussions and continued to have numerous job duties and responsibilities

taken away from her. In addition, other University employees began to approach Ms. Hatheway, harass her and make comments to her about retirement. For example, on or about April 3, 2008, Ms. Karen Thompsons, a Department of English instructor, approached Ms. Hatheway, allegedly on behalf of Ms. Allen, telling her it was probably not comfortable for Ms. Hatheway to be there, and so "why don't you get another job?", and asking "how long are you going to stay?" (R. Vol. III, p. 524, L. 4-14 and p. 518, L. 1-3, pp. 547-560)[5]

11. On April 29, 2008, Ms. Hatheway received a second negative annual performance evaluation which again marked her as an employee who "needs improvement;" thereby initially disqualifying her once more for an automatic pay raise.

A few weeks later, on or about April 29, 2008, Ms. Hatheway was provided her 2007 annual performance evaluation for the rating period of 1/01/2007 to 12/31/2007. (R. Vol. III, p. 524, L. 15-26, pp. 619-637) In light of the administrative procedures that were transpiring, Ms. Hatheway's 2007 evaluation was conducted and provided to her by the Associate Dean of the College of Letters, Arts, and Social Sciences, Ms. Debbie Storrs; regardless, it still received input directly from Dr. Olsson.

To Ms. Hatheway's dismay, this 2007 evaluation was again another poor evaluation. Ms. Hatheway received another, two (2) "Needs Improvement" ratings. The two "Needs Improvement" ratings were given in the criteria of "teamwork" and "attendance." Receiving at least one "Needs Improvement" rating meant that Ms. Hatheway was again ineligible for the automatic state pay raise and eligible to be placed on probation. Therefore, Ms. Hatheway

[5] Dr. Olsson testified that Ms. Thompson approached him and told him that Ms. Hatheway did not like him, that Ms. Thompson stated that she herself had a problem, issue, or concern with Ms. Hatheway, and that Ms. Thompson and Ms. Allen had a fairly close relationship. (R. Vol. II, pp. 403, 416-417 and 424-425)

received a letter for May, 2008, stating that her pay was going to be frozen at the hourly rate of $13.03. This was the rate that it had been at since May 10, 2006. (R. Vol. III, p. 5159, L. 1-3, pp. 594-594; p. 524, L. 15-26, pp. 638-641 and pp. 528-545)

In regards to the basis for receiving two negative marks, Ms. Hatheway's evaluation made vague references to "evidence" of unprofessional communication and unclear absences, without any specific details or instances provided. In fact, the evaluation stated that "[m]ost directors indicated she met or exceeded expectations in regard to teamwork, noting her polite and respectful response to requests and willingness to engage in work that arises." (R. Vol. III, p. 524, L. 15-26, pp. 619-636) The basis for the negative mark on unprofessional communication was from only one of the six evaluators. Yet, that evaluator, Dr. Robert Wrigley (whose supervisor at that time was also Dr. Olsson), testified, when questioned about his evaluation, that Ms. Hatheway "was *always* someone tremendously cordial, tremendously friendly, extremely nurturing." (R. Vol. II, p. 449 and 454)

Following a meeting regarding her second straight terrible evaluation, on or about June 12, 2008, Ms. Hatheway was provided an amended annual performance review for the 2007 year that still had a needs-to-improve rating on the area of "teamwork."[6] As a result Ms. Hatheway continued to be ineligible for the automatic state pay raise and eligible to be placed on probation. However, on or about June 19, 2008, Ms. Hatheway received notification that she would receive a pay raise. (R. Vol. III, pp. 528-545 and p. 519, L. 1-3, pp. 594-595)

[6] The amended review had a change of the attendance criteria evaluation to "Meets Requirements." (R. Vol. III, p. 524, L. 15-16, pp. 638-641).

12. Ms. Hatheway's work conditions caused her bodily, mental and emotional injury, resulting in medical treatment, premature retire from the University of Idaho.

The isolation, lack of communication, removal of job tasks, and hostility towards Ms. Hatheway in the office by Dr. Olsson and Ms. Allen, and baseless poor evaluations leading to lack of pay raises caused Ms. Hatheway severe emotional stress and anxiety over her working conditions that resulted in dizziness and a rise in her blood pressure. (R. Vol. II, pp. 300 and 322)

Due to the symptoms Ms. Hatheway was suffering as a result of the incidents with the University, on or about August 21, 2008, Ms. Hatheway sought medical treatment with her primary health care provider, Dr. Richard K. Howe, M.D., at Moscow Family Medicine. (R. Vol. II, pp. 300 and 306-308 and R. Vol. III, p. 643, L. 4-7, pp. 646-655) Dr. Howe objectively assessed Ms. Hatheway with "anxiety [that was] poorly controlled with recent stresses at work." (R. Vol. III, p. 643, L 4-7, pp. 646-655)

A few days later, on or about August 25, 2008, Ms. Hatheway woke up feeling very "dizzy" and was unable to go to work; as a result, she returned to Dr. Howe. Dr. Howe then assessed Ms. Hatheway with "dizziness for a few days – some improvement – possible anxiety symptoms" and then placed Ms. Hatheway off of work for a few days. (R. Vol. III, p. 643, L 4-7, pp. 646-655)

With being placed on medical leave, discussing her medical issues and work with Dr. Howe, and realizing that the University's conduct at work was causing her severe physical, mental and emotional troubles, on or about August 28, 2008, Ms. Hatheway decided to provide

the University notice that she could no longer work under the conditions and therefore was being forced to retire. (R. Vol. II, pp. 300 and 323-324) Ms. Hatheway testified that simply "the work conditions became intolerable." (R. Vol. II, pp. 479 and 482) So on that day, Ms. Hatheway provided Dr. Olsson and the University a letter informing them of her intention to retire from the University of Idaho on September 12, 2008. The University staff recognized that Ms. Hatheway was upset with leaving. (R. Vol. II, pp. 479 and 482)

13. Following Ms. Hatheway's forced departure, Dr. Olsson hired a replacement for Ms. Hatheway who was thirty-two (32) years old, and gave that individual a higher starting salary than Ms. Hatheway had at the end of her employment tenure with the University.

After Ms. Hatheway's constructive discharge from the University, Dr. Olsson embarked on hiring Ms. Hatheway's replacement. (R. Vol. II, pp. 403 and 427) On December 8, 2008, Dr. Olsson hired a woman by the name of Ms. Brittney Carmen. At the time of her hire, Ms. Carmen was 32-years-old. (R. Vol. II, pp. 509-511) In addition, when Ms. Carmen was hired, her starting hourly wage was higher, $13.75 per hour, than Ms. Hatheway's hourly wage at the end of her employment, $13.41. (R. Vol. II, pp. 513-516)

II. ISSUES PRESENTED ON APPEAL

1. Did the district court err in granting summary judgment on Ms. Hatheway's age discrimination claims, including disparate treatment, hostile work environment, and constructive discharge, under the IHRA?

2. Did the district court err in granting summary judgment on Ms. Hatheway's retaliation claim under the IHRA?

3. Did the district court err in granting summary judgment on Ms. Hatheway's negligent infliction of emotional distress claim?

III. ATTORNEY FEES ON APPEAL

An award of attorney fees may be granted to the prevailing party on appeal pursuant to Idaho Code § 12-121 and Idaho Appellate Rule 41, when the court is left with the abiding belief that the appeal has been brought, or defended frivolously, unreasonably, or without foundation. Hagy v. State, 137 Idaho 618 (Ct. App. 2002); (see, e.g., Shawver v. Huckleberry Estates, L.L.C., 140 Idaho 354, 365 (2004) (holding that a district court's grant of summary judgment in favor of a purchaser was improper, and that therefore attorney fees for the appealing party was proper pursuant to I.A.R. 41 because it was the prevailing party on appeal and the sale agreement further provided as such). A plaintiff may be entitled to an award of fees for an appeal under the prevailing party standard even though a defendant could ultimately be found to be the prevailing party after trial. Bowen v. Heth, 120 Idaho 452 (Ct. App. 1991). Thereby, if the Supreme Court determines that the District Court's grant of summary judgment was improper, and Ms. Hatheway is implicitly the prevailing party for purposes of the appeal, and Supreme Court should award Ms. Hatheway her attorney's fees for having to bring this unnecessary appeal.

IV. SUMMARY OF ARGUMENT

Ms. Hatheway presented evidence that the University and her direct supervisor voiced a policy to promote youthful hiring and removing aging employees, immediately after which she began to receive her first ever poor evaluations, was denied pay raises, and significantly lost job duties. The University also hired a younger contemporary and paid her more despite University

rules. Ms. Hatheway was also treated poorly, and subjected to continued, age-based, harassing behavior such as comments about retirement, about her not returning to work, and refusal to include her in departmental communications and operations. The evidence presented included undisputed statements and speeches from the University President, an undisputed pay differential with younger employees, an undisputed change in her performance evaluations, established comments from her supervisors on the necessity for young employees, and her own testimony of comments and conduct by her supervisor and others for the University. This evidence created both direct evidence of discrimination, hostile work environment, retaliation and constructive discharge, as well as establishing a prima facie case to hurdle the "McDonnell Douglas" burden shifting analysis on pretextual explanation for discriminatory conduct. However, the trial court incorrectly applied the burden of proof in a discrimination claim, improperly weighed the evidence and made credibility determinations, which led him to rule that no issues of fact existed.

V. ARGUMENT

A. The Standard of Review on a discrimination case precludes an aware of summary judgment.

The Idaho Supreme Court reviews an appeal from an order of summary judgment de novo. Curlee v. Kootenai County Fire & Rescue, 148 Idaho 391, 394 (2008). In such a case, the Idaho Supreme Court employs the same standard as that used by the trial court when ruling on the motion. Avila v. Wahlquist, 126 Idaho 745, 747 (1995).

Summary judgment should be granted only if the court determines that "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c); Sharp v. Moore, Inc., 118 Idaho 297, 299 (1990); Bonz v. Sudweeks, 119 Idaho 539, 541 (1991). All disputed facts are to be construed liberally in favor of the nonmoving party, and any reasonable inferences that can be drawn from the record are to be drawn in the light most favorable to the nonmoving party. Sharp, 118 Idaho at 299; Bonz, 119 Idaho at 541. When ruling on a motion for summary judgment, it is not within the court's province to assess the credibility of an affiant or deponent when credibility can be tested in court before a trier of fact. Sohn v. Foley, 125 Idaho 168, 171 (Ct.App. 1994); Lowry v. Ireland Bank, 116 Idaho 708, 711 (Ct.App. 1989). The role of the trial court at the summary judgment stage is limited to discerning whether there are any genuine issues of material fact to be tried; it does not extend to deciding them. Curlee, 148 Idaho at 396.

Specifically in employment discrimination cases, there is a high standard for granting of summary judgment. Schnidrig v. Colum. Mach., Inc., 80 F.3d 1406, 1410 (9th Cir. 1996).[7] At the summary judgment stage, the plaintiff who alleged employment discrimination's burden is not high. Pottenger v. Potlatch Corp., 329 F.3d 740, 746 (9th Cir. 2003). Very little evidence is necessary to survive summary judgment in a discrimination case because the ultimate question is one that can only be resolved through a "searching inquiry" – one that is most appropriately

[7] Idaho and other state courts routinely use federal court decisions interpreting federal anti-discrimination laws such as the ADEA for guidance and interpretation of the Idaho Human Rights Act and other state anti-discrimination laws. See, e.g., Bowles v. Keating, 100 Idaho 808, 812, (1979); Hoppe v. McDonald, 103 Idaho 33 (1982); Pottenger, 329 F.3d 740.

conducted by the factfinder, upon a full record. Schnidrig, 80 F.3d at 1410; Lam v. Univ. of Haw., 40 F.3d 1551, 1563 (9th Cir. 1994). If a rational trier of fact could, on all the evidence, find that the employer's action was taken for impermissibly discriminatory reasons, summary judgment for the defense is inappropriate. Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994).

Once a prima facie case is established, summary judgment for the defendant will ordinarily not be appropriate on any ground relating to the merits because the crux of a [discrimination] dispute is the elusive factual question of intentional discrimination. Lindahl v. Air France, 930 F.2d 1434 (9th Cir. 1991). Courts are hesitant to grant summary judgment in employment discrimination cases, if issues of motive or intent are involved because in such cases, genuine issues of fact usually exist. Evans v. Tech. Applications & Serv.Co., 80 F.3d 954 (4th Cir. 1996); Gifford v. Atchison, Topeka & Santa Fe Ry. Co., 685 F.2d 1149 (9th Cir. 1982). When motive and intent are involved, the summary judgment standard is to be applied rigorously in employment discrimination cases because intent and credibility are frequently crucial issues. Wohl v. Spectrum Mfg., Inc., 94 F.3d 353 (7th Cir. 1996). Thus, summary judgment is not proper if the plaintiff has produced more than a scintilla of evidence that the employer's motive for the adverse action was illegitimate. Flavel v. Svedala Indus., Inc., 868 F. Supp. 1422 (E.D. Wis. 1994).

Thus, because of inherently factual nature of the employment discrimination inquiry, a plaintiff need produce very little evidence of discriminatory motive to raise a genuine issue of fact. Any indication of discriminatory motive may suffice to raise a question that can only be

resolved by a fact-finder. Unfortunately, in granting the University of Idaho's motion for summary judgment, the District Court did assess the credibility of affiants, decided genuine issues of material fact, and did not construe disputed facts liberally in favor of the non-moving party, Ms. Hatheway.

B. There are genuine issues of material fact, credibility determinations, and issues of motive and intent which should have precluded summary judgment on Ms. Hatheway's IHRA age discrimination claims.

The facts and evidence presented in this case establish a genuine issue of fact that Ms. Hatheway was subjected to intentional age discrimination (as opposed to unintentional, disparate impact discrimination) by the University of Idaho.

To establish a prima facie case of her age discrimination claim Ms. Hatheway must show that: (1) she is at least 40 years of age; (2) she was qualified for her position and performing her job in a satisfactory manner; (3) she was discharged (including constructive discharge) or her employer took adverse employment actions against her; and (4) her position was filled by a younger person of equal or less qualifications. The third element of the prima facie case above may be found by a sub-claim of constructive discharge, which Ms. Hatheway has alleged (in addition to other adverse employment actions). Under a constructive discharge claim, the plaintiff must show that "a reasonable person in [the employee's] position would have felt that [the employee] was forced to quit because of intolerable and discriminatory working conditions. Schnidrig, 80 F.3d at 1411; Waterman v. Nationwide Ins. Co., 146 Idaho 667 (2009).

Ms. Hatheway soundly meets all elements of the prima facie cases set forth above. Particularly considering that the proof required to establish a prima facie case on an employment

discrimination claim is "minimal and does not even need to rise to the level of a preponderance of the evidence." Chuang v. Univ. of Cal. Davis, Bd. of Trs., 225 F.3d 1115, 1124 (9th Cir. 2000) (determining that remarks about "two chinks" in reference to Chinese-American professor seeking tenure at university was sufficient to create issue of fact as to professor's prima-facie case for race discrimination). The prima facie case may be based either on direct evidence of discriminatory intent or a presumption arising from the factors such as those set forth in *McDonnell Douglas*, which allows indirect evidence to establish a prima facie case where there may not be direct motive of discrimination. Wallis, 26 F.3d at 889 (citing Lowe v. City of Monrovia, 775 F.2d 998, 1009 (9th Cir. 1985).

As stated in the recent U.S. Supreme Court decision Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009) "plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove [at trial], by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision." Gross, Inc., 557 U.S. at 180. However, Gross does not place a heightened evidentiary requirement on ADEA plaintiffs to prove that age was the sole cause of the adverse employment action. Jones v. Oklahoma City Pub. Schs., 617 F.3d 1273, 1277-1278 (10th Cir. 2010).

In this case, it is undisputed that Ms. Hatheway is over forty and was replaced by a younger employee under forty. Furthermore, the District Court in this case found, and Ms. Hatheway takes no issue with the District Court's Opinion and Order in regards to the

second element of the prima facie case of age discrimination that "whether Ms. Hatheway was performing her job in a satisfactory manner is factually disputed and as such is not conducive to a determination on motion for summary judgment." (R. Vol. III, p. 679)

Therefore, the crux of the dispute of the case on summary judgment on Ms. Hatheway's age discrimination claims and constructive discharge claim are: (1) whether there are genuine issues of material fact that Ms. Hatheway suffered adverse employment actions and/or was constructive discharged; and (2) if so, whether there are genuine issues of material fact that but-for Ms. Hatheway's age and/or her protected activities engaged in, she would not have suffered the adverse employment actions and/or was constructively discharged. The District Court erred in its decision granting summary judgment on these two issues because there is direct evidence which creates genuine issues of material fact that both Ms. Hatheway did suffer adverse employment actions, was constructive discharged, and that but-for Ms. Hatheway's age, she would not have suffered those adverse employment actions and constructive discharge.

1. There is direct evidence that Ms. Hatheway suffered adverse employment actions and that age and/or engagement in protected activities was the but-for cause of her adverse employment actions suffered.

The District Court wrongly found that Ms. Hatheway's claims of age discrimination failed as a matter of law because Ms. Hatheway could not meet the prima facie element that she was (constructively) discharged or her employer took adverse employment actions against her based on a discrimination motive. However, Ms. Hatheway presented direct evidence that the University and its agents made ageist comments and established a policy of seeking young

employees who they paid more to, while mistreating a previously highly regarded but older employee.

Direct evidence in the context of a discrimination case is defined as evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude . . . sufficient to permit the *fact finder* to infer that that attitude was more likely than not a motivating factor in the employer's decision. Enlow v. Salem-Keizer Yellow Cab Co., Inc., 389 F.3d 802, 812 (9th Cir. 2004). Stated another way, direct evidence is evidence, which, if believed, proves the fact of discriminatory animus without inference or presumption. Goodwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1221 (9th Cir. 1998).

Furthermore,

> [w]hen a plaintiff does not rely exclusively on the presumption but seeks to establish a prima facie case through the submission of actual evidence, very little such evidence is necessary to raise a genuine issue of fact regarding an employer's motive; any indication of discriminatory motive ... may suffice to raise a question that can only be resolved by a factfinder.

Lowe, 775 F.2d at 1009.

Using the above rational in a Motion for Summary Judgment on a discrimination case, courts have held:

> when a plaintiff has established a prima facie inference of disparate treatment through direct or circumstantial evidence of discriminatory intent, he will *necessarily* have raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer's articulated reason for its employment decision." ... When [the] evidence, direct or circumstantial, consists of more than the *McDonnell Douglas* presumption, a factual question will almost always exist with respect to any claim of a nondiscriminatory reason. The existence of this question of material fact will ordinarily preclude the granting of summary judgment.

Schnidrig, Inc., 80 F.3d at 1410; Sischo-Nownejad v. Merced Cmty. Coll. Dist, 934 F.2d 1104, 1111 (9th Cir.) (quoting Lowe, 775 F.2d at 1009).[8] Here, there was an abundance of direct evidence that shows that Ms. Hatheway did suffer multiple adverse employment actions as a direct result of discriminatory motive.

(a) The evidence established that Ms. Hatheway suffered adverse employment actions leading to constructive discharge.

First, another employee who was younger, had less tenure with the University, and less "Hay Points" than Ms. Hatheway, and received a higher rate of pay than Ms. Hatheway. At the time of her hire, Ms. Allen was 47 years old and Ms. Hatheway was 62 years old; which is a 15 year difference of age between the two.[9] After raising that issue with Dr. Olsson and the Dean, and stating that she believed that it was based on her age, Ms. Hatheway was denied a remedy.

Second, after complaining about that issue after President White's speech about older workers needing to retire, and Dr. Olsson's ageist comments, the University began a pattern of behavior conduct and comments that materially affected the compensation, terms, conditions, or privileges of Ms. Hatheway's employment. This included, but is not limited to, isolating her,

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[8] When an employee presents direct evidence to support his or her disparate treatment claim, the Court will not apply the *McDonnell Douglas* burden-shifting analysis (which is discussed below in section V.B.2). See Enlow v., 389 F.3d at 812 (stating that when a plaintiff alleges disparate treatment based on direct evidence in an ADEA claim, we do not apply the burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) in determining whether the evidence is sufficient to defeat a motion for summary judgment. In Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985), the Supreme Court instructed that "the McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination.").

[9] The fact that Ms. Allen was over 40 years of age, i.e., she herself was in the protected class for age discrimination is not probative. Case law provides that the fact that an individual loses out to another individual in the same protected class is irrelevant, so long as the individual is being discriminated against based on their age. O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312 (1996).

keeping her out of the loop of communications, changing her work area without her notice, failing to follow-up and having required meetings with Ms. Hatheway, and taking away several of her essential job duties and responsibilities. The University admits that they did not follow-up on some of the required meetings and that they rearranged her work area. They also admit that Ms. Hatheway had some of her essential job duties and responsibilities removed from her. "[S]ignificantly diminished material responsibilities" is an indication of a material adverse employment action. Waterman,146 Idaho at 672-673, citing Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

Third, after raising her issues with regards to her pay and stating that she believed the disparity was based on her age (and President White and Dr. Olsson's ageist comments), and receiving negative conduct and actions within the office, Ms. Hatheway received back to back poor annual evaluations, the first ever in her entire professional career. The evaluations were completely subjective and Ms. Hatheway has presented evidence, that when viewed in a light most favorably to her, shows they were untrue. This resulted in Ms. Hatheway being disqualified for an automatic pay raise and being on probation (according to the University's polices). The evaluation, coupled with the PDP was "a final verbal warning." Accordingly, this direct, undisputed evidence alone clearly establish an adverse employment action to survive summary judgment on that element of Ms. Hatheway's claims.

The facts and evidence discussed above further create a material issue of fact that Ms. Hatheway was constructively discharged. That is, a reasonable jury could clearly conclude that Ms. Hatheway's working conditions became so intolerable that a reasonable person in her

shoes would have felt compelled to resign. Those facts and evidence include, but not limited to: (1) being denied a pay raise due to a younger, less tenured, less hay points individual receiving a larger pay rate; (2) receiving back to back needs-to-improve evaluations based on false and erroneous allegations which resulted in being eligible for probation and being disqualified for her automatic pay raises after complaining about perceived age discrimination; (3) having Ms. Hatheway's supervisor and the University tell her and/or hearing comments such as "keep quiet and suck it up," "move on," "are you coming back" (suggesting she should retire), that they were going to "replace" Ms. Hatheway," they had her under "continued surveillance," admitting that Dr. Olsson wanted a "young and energetic" employee, and being asked "why don't you get another job...do you like your job...how long are you going to stay?," (4) being placed in isolation, being removed from the loop of necessary communication, not being followed-up with required meetings, having her work space rearranged without her knowledge, and having essential job duties and responsibilities taken from Ms. Hatheway; and (5) having Ms. Hatheway's doctor place her off of work due to the bodily, mental and emotional symptoms, including physical manifestations such as the dizziness and rise in blood pressure, Ms. Hatheway was suffering from the stress and anxiety that was being caused by the University.

Based on the above, it is plain that there were genuine issues of material fact created by the direct evidence on the issue of whether Ms. Hatheway suffered adverse employment actions and/or was constructive discharged; therefore the District Court's grant of summary judgment on that basis was erroneous and the Supreme Court should reverse the Opinion and Order.

(b) The facts and evidence provided by Ms. Hatheway further establish that these adverse employment actions lead to constructive discharge were based on discriminatory animus.

Ms. Hatheway presented directed statements by persons involved in the decision-making process, President White and Dr. Olsson that directly reflect discriminatory attitude against age. This is sufficient to permit the fact finder to infer that Ms. Hatheway's age and/or her reporting of age discrimination was the cause of her adverse employment actions. Yet, despite the standard that the facts are to be viewed in the light most favorable to Ms. Hatheway, that credibility determinations are not to be made on summary judgment[10], and that all inferences are to be made for the non-moving party, the District Court abused its discretion and found that Ms. Hatheway had not provided direct evidence on the University's and Dr. Olsson's age biased motive and intent. This was in error.

First, Defendants do not deny all of the ageist comments made in this case; however, they stated that Plaintiff could not survive summary judgment because said comments were "stray comments" and Ms. Hatheway could not establish a nexus for them to the adverse actions. Ultimately the court agreed with the University that the ageist comments were allegedly "stray comments."

While "stray remarks" by non-decisionmakers or by decision makers unrelated to the decision process are given less weight, courts do recognize the weight given is somewhat dependent on whether the comments are temporally remote from the date of decision. See,

[10] As stated above, it is not within the court's province on summary judgment to assess the credibility of an affiant or deponent as credibility is left for the trier of fact at trial. Sohn, 125 Idaho at 171.

Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 545 (3d Cir. 1992). While comments can be made without suggesting age discrimination, "like any remarks, they must be viewed in context, along with the specific language used and the number of times the comments were made." Schug v. The Pyne-Davidson Co., No. 2001 WL 34312877, at *5 (D.Conn. 2001). As the Ninth Circuit Court stated in a recent age discrimination case that "[d]etermining whether the comments were, in fact, innocuous or, in fact, a sign of bias belongs to the jury." Troy v. Standard Ins. Co., 24 Fed.Appx. 801, 803 (9th Cir. 2001).

As the facts provided above offer, especially when viewed in the light most favorably to Ms. Hatheway, there were several age and/or age discrimination retaliation related comments made in this case which were not stray comments, but instead is direct evidence of age biased intent and motive, all temporally related to her declining treatment, evaluations and pay. Some of those comments included, but are not necessarily limited to: (1) "we also have a responsibility, individually and collectively, to retire. And when we get to that point in life where we're not as productive, where it'll help the University and our program that we care so deeply about, recruit a young entry-level or mid-career person. It is time to get out of the way."; (2) "keep quiet and suck it up,"; (3) "move on,"; (4) "are you coming back" (suggesting Ms. Hatheway should retire); (5) that they were going to "replace" Ms. Hatheway:" (6) they had Ms. Hatheway under "continued surveillance:" (7) Dr. Olsson wanted a "young and energetic" employee; and "no" he would not consider a qualified older worker (8) and being asked "why don't you get another job...do you like your job...how long are you going to stay?"

All of the above comments clearly give rise to the inference of anti-age bias and/or age discrimination retaliation, which created a material issue of fact precluding summary judgment. See, e.g., Greenberg v. Union Camp Corp., 48 F.3d 22, 28-29 (1st Cir. 1995), citing Calhoun v. Acme Cleveland Corp., 798 F.2d 559, 561 (1st Cir.1986) (stating in pertinent part that repeated and/or coercive inquiries can clearly give rise to a reasonable inference of an anti-age bias (and lend support to a finding of constructive discharge), see Calhoun, 798 F.2d at 562-63 (three inquires over seven months coupled with demotion requiring employee to report to younger person employee had previously trained, and threat of onerous working conditions if no resignation).

Additionally, the first of those comments were made by former University president Timothy P. White during his State of the University Address. The facts and evidence of this case show that the President's speech was made on or about May 1, 2006, right before the time that the adverse employment conducts started to occur against Ms. Hatheway. President White's comments were also made shortly before Dr. Olsson's similar "young" comments reflecting age discriminatory animus were made at the Faculty meeting. The comments made by President White during his State of the University Address concerning age were made in the open to all University employees, were made as the senior decision-maker of the University and were made regarding assignments, promotions and university policies. The remarks made by him were not merely general observations or loose comments, but rather were statements meant to have purpose and policy at the University, and to cause older University employees to retire.

This power and influence is evidenced by the treatment of Ms. Hatheway. The reasonable inference that can be drawn is that President White's comments and position on age and retirement were intended, and ultimately did shape and influence the intentions of the University's decision-makers attitude toward its older workers. That intention and attitude of the University decision-makers was for older retirement age University employees to retire and allow the University to hire "young, entry-level or mid-career persons" to replace them. That is exactly what occurred in this case. First, Dr. Olsson stated that he would only consider a "young" person for the MFA position. The individual hired for that position was thirty-six years old, below the protected classification for age. Then, after Dr. Olsson successfully forced Ms. Hatheway into retirement, he was able to hire a "young" replacement for her, Ms. Brittney Carmen. At the time of her hire, Ms. Carmen was thirty-two years old, again below the protected classification of age.

Furthermore, when the fact section above is set out in sequential order, the direct evidence establishes a temporal relationship between the comments and the adverse employment action(s) Ms. Hatheway suffered. Temporal relationships create a sufficient nexus. The President's speech occurred right before Ms. Hatheway began to suffer the negative treatment and conduct, including, but not limited to, the isolation, lack of communication and removal of some of her essential job duties. Then, Dr. Olsson's comments about a "young and energetic" employee occurred right before her first poor evaluation. Lastly, the other age related comments occurred as Ms. Hatheway was being subjected to a hostile work environment after Ms. Hatheway reported her belief of Age Discrimination and in the form of two poor annual

evaluations, removal of some of her essential job duties, and being set-up for failure in her position by Dr. Olsson by isolating and keeping her out of the loop of communications. Therefore, the District Court's grant of summary judgment was improper and should be reversed.

2. In addition to the direct evidence, Ms. Hatheway's age discrimination claim and constructive discharge claim must not be dismissed on summary judgment under the McDonnell Douglas burden-shifting analysis.

Even assuming that the evidence of genuine issues of fact of age discrimination, hostile work environment, retaliation, and constructive discharge in this case was not sufficiently "direct," the Court should not have granted summary judgment in favor of the University under the *McDonnell Douglas* burden shifting test. At the summary judgment stage in age employment discrimination cases, where there is no direct evidence of discrimination, courts, including the Ninth Circuit (citing Gross) still use the *McDonnell Douglas* analysis. See, e.g., Shelley v. Geren, 666 F.3d 599, 607-08 (9th Cir. 2012). Courts in the Ninth Circuit recognize that the *McDonnell Douglas* burden-shifting framework for age discrimination claims under both the ADEA and the IHRA where an employee must rely on circumstantial evidence to prove disparate treatment. Enlow, 389 F.3d at 812.

The *McDonnell Douglas* is simply "a tool to assist plaintiffs at the summary judgment stage so that they may reach trial ... [I]t is not normally appropriate to introduce the *McDonnell Douglas* burden-shifting framework to the jury." Costa v. Desert Palace, Inc., 299 F.3d 838, 855 (9th Cir.2002). The *McDonnell Douglas* test is if a plaintiff establishes a prima facie case, '[t]he burden of production, but not persuasion, then shifts to the employer to articulate some

legitimate, nondiscriminatory reason for the challenged actions.' Hawn v. Exec. Jet Mgmt., Inc., 615 F.3d 1151, 1155 (9th Cir.2010) (quoting Chuang, 225 F.3d 1115, 1123–24 (9th Cir.2000)). "If defendant meets this burden, plaintiffs must then raise a triable issue of material fact as to whether the defendant's proffered reasons for their terminations are mere pretext for unlawful discrimination." Id.

A plaintiff can prove pretext (1) indirectly, by showing that the employer's proffered explanation is 'unworthy of credence' because it is internally inconsistent or otherwise not believable, or (2) directly, by showing that unlawful discrimination more likely motivated the employer. Shelley, 666 F.3d at 609. See, also Morrow v. Bard Access Sys., Inc., 2011 WL 2471525 (D. Or. 2011) (wherein a plaintiff who contended that age, not misconduct, was the reason for his termination, survived summary judgment when the plaintiff largely relied on his own affidavit, in which he describes statements made by several of defendant's managers that may be construed as demonstrating age bias; the court held that at a summary judgment proceeding, the veracity of plaintiff's testimony was not before the court, accepted the plaintiff's testimony as true for purposes of the pending motion, and found that a reasonable trier of fact could find that plaintiff's termination was an unlawful employment practice).

Applying the *McDonnell Douglas* burden-shifting analysis to this case, Ms. Hatheway must first establish a prima facie case of age discrimination. Ritter v. Hughes Aircraft Co., 58 F.3d 454, 456 (9th Cir. 1995). As set forth above, taking Ms. Hatheway's evidence as true, and giving the benefit of all inferences, there is ample evidence in the record to create a genuine issue of material fact on each element of the prima facie case of age discrimination.

The burden then shifts to the employer, the University of Idaho, to articulate a non-discriminatory reason for its adverse employment action. It was the University's position on its motion for summary judgment, which ultimately the District Court agreed, that its basis for its adverse employment actions were that Ms. Hatheway was simply an unhappy employee who disliked her co-workers and the poor evaluations were justified. The University argued thereby, and the District Court wrongly agreed that Ms. Hatheway then could not establish her claims because of their proffered non-discriminatory reason.

However, Ms. Hatheway provided sufficient evidence to rebut and/or at least create issues of material fact that the University's reasons for its adverse employment actions were not believable, inconsistent, and were in fact false (pretextual). Ms. Hatheway presented evidence that, when viewed in the light most favorable to her, shows that she was actually an exceptional employee, who was not disgruntled, and that the poor evaluations were not factually justified. The argument that Defendants' alleged non-discriminatory reason is in fact a pretext to discrimination is bolstered by the undisputed evidence that Ms. Hatheway was a highly regarded University employee who had been nominated for numerous University awards, always received excellent yearly evaluations and had an impeccable work history up to the point of the discrimination and retaliation occurred.

In her last yearly evaluation given to Ms. Hatheway by Dr. Barber, it rated her as outstanding. In her last yearly evaluation give to Ms. Hatheway before the discrimination and retaliation began, Dr. Olsson rated Ms. Hatheway also as outstanding. Yet, after the ageist comments by Dr. White and Dr. Olsson were made, and Ms. Hatheway's complaints thereof,

Ms. Hatheway then received in her very next annual evaluation an overall rate of below expectations, placing her on probation and denying her an automatic state pay raise. The timing of this is a significant circumstantial fact because the only two real matters that occurred between these evaluations were the Faculty meeting and President White's speech. It is implausible and inherently inconsistent to state on one hand that Ms. Hatheway was a bad employee who needed-to-improve, and on the other receive nominations for the outstanding employee of the year. Accordingly, the circumstantial evidence of Ms. Hatheway's superior work history, the positive comments made by her peers, and the recognition for her outstanding work during the same time that she was receiving the adverse employment actions against her, tends to show that the Defendants' reason for the adverse employment action against Ms. Hatheway was really a pretext to discrimination.

Even Defendants' proffered reason for its adverse employment actions against Ms. Hatheway, i.e. a personality conflict with Ms. Allen and being an unhappy employee which allegedly resulted in misconduct by Ms. Hatheway, creates a genuine issue of material fact still exists on that issue. Stated plainly, there are two competing inferences that can be drawn from the evidence, the University's and Ms. Hatheway's. Ms. Hatheway's reasonable competing inference from the evidence is that it was Ms. Hatheway's age and/or her reporting of age discrimination was the basis for the negative reviews and the negative actions/conduct she received from the University which forced her to retire. Consequently, two competing reasonable inferences create a question of fact that can only be decided by the trier of fact.

Moreover, if the facts and evidence establish that Ms. Hatheway was an unhappy employee, it was due to the fact that she was being subjected to discrimination and retaliation because in part the bases for her poor evaluations were false and/or lacked merit. The University cannot use Ms. Hatheway's proper reporting or discussions of her treatment as proof of her lack of "teamwork," and then use it as the basis for her poor treatment. And, that issue is a question of credibility which requires a subjective analysis, one that the District Court was not allowed to make, yet did regardless. As stated in the standard of review section above, in reviewing such credibility and subjective documents in a motion for summary judgment, all reasonable inferences must be drawn in favor of the non-moving party, Ms. Hatheway, and the Court must not make credibility determinations. See, e.g., Stansbury v. Blue Cross of Idaho Health Serv., Inc., 128 Idaho 682, 685-86 (1996) (wherein the Idaho Supreme Court in a discrimination case took all of a non-moving plaintiff's assertions to be true, and held, in light of a factual dispute, to vacate a district court's entry of summary judgment against the plaintiff).

As a result of the above arguments, and based upon the *McDonnell Douglas* analysis, the District Court's grant of summary judgment was wrong and should be overturned.

C. Issues of fact existed on Ms. Hatheway's hostile work environment claim to preclude summary judgment.

To prevail at trial on her hostile work environment age discrimination claim, Ms. Hatheway must show: (1) she was subject to verbal or physical conduct of a [age discriminatory] nature; (2) that the conduct was unwelcome; (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive

working environment; and that (4) the employer ratified, knew, or should have known about the conduct. Like hostile work environment claims brought under Title VII, employees who allege a hostile work environment under the ADEA must prove the existence of severe or pervasive and unwelcome verbal or physical harassment because of the employee's age. See Sischo-Nownejad, 934 F.2d at 1109 (superseded by statute on other grounds) (recognizing a claim for a hostile work environment based on age under the ADEA).

The facts and evidence supporting the constructive discharge claim from the materials submitted at the motion for summary judgment, also supports that the District Court should not have granted summary judgment on Ms. Hatheway's hostile work environment claim. The facts and evidence brought forth by Ms. Hatheway, when considered true, and viewed in the light most favorably to her establish that there are genuine issues of material fact a reasonable jury could use to conclude that: (1) Ms. Hatheway was subjected to verbal or physical conduct because of her age; (2) that the conduct was unwelcome, as evidenced by her numerous complaints about it and ultimately being forced to retire; (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the Plaintiff's employment and create an abusive working environment, which is also evidence by the fact that there was an abusive working environment that caused Ms. Hatheway to suffer bodily, mental and emotional harm, which necessitated medical treatment, and left her no reasonable choice but to quit; and that (4) the employer ratified, knew, or should have known about the conduct at issue but failed to take action or took insufficient action to prevent it, as evidenced by Ms. Hatheway's early and often complaints to Dr. Olsson, the Dean, and to the IHRC of the age discriminatory conduct, which

continued up through the point of her retirement. Therefore, the University of Idaho's motion for summary judgment on this claim was also improperly granted.

D. Issues of fact existed on Ms. Hatheway's retaliation claim to preclude summary judgment.

To prevail at trial on her retaliation claim, Ms. Hatheway must show that she was discriminated against because she "opposed any practice made unlawful by this chapter [the IHRA] or because such individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter." Patterson v. State, Dept. of Health & Welfare, 151 Idaho 310, 318 (2011); I.C. § 67-5911. Case law provides that the prima facie elements Ms. Hatheway must show for a retaliation claim are a (1) protected activity, (2) adverse employment action, and (3) causation. Stegall v. Citadel Broad. Co., 350 F.3d 1061, 1065-66 (9th Cir. 2003).

"Protected activities include: (1) opposing an unlawful employment practice; and (2) participating in a statutorily authorized proceeding." E.E.O.C. v. Luce, Forward, Hamilton & Scripps, 303 F.3d 994, 1005 (9th Cir. 2002). It is not disputed that Ms. Hatheway engaged in protected activities by both opposing a (disputed) unlawful employment practice, and also participated in a statutorily authorized proceeding.

Generally under retaliation claims, an "adverse employment action" is "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in a protected activity." Ray v. Henderson, 217 F.3d 1234, 1244 (9th Cir. 2000). This definition includes actions "materially affect[ing] compensation, terms,

conditions, or privileges" of employment. 42 U.S.C. § 2000e-2(a)(1); Kortan v. Cal. Youth Auth., 217 F.3d 1104, 1109 (9th Cir. 2000). The direct evidence in this case establishes that Ms. Hatheway both opposed an unlawful employment practice, but also participated in a statutorily authorized proceeding when she filed her Idaho Human Rights Complaint. Direct evidence establishes that shortly thereafter, Ms. Hatheway suffered adverse employment actions including poor evaluations, isolation, failure to receive increase in pay, and removal of her employment duties.

Further, direct and circumstantial evidence shows that the reasons for the adverse employment actions were false, and the timing and nexus of those actions creates a question of fact on the issue of causation. Causation is generally held to be a question of fact that can only be determined by a trier of fact. See e.g. Ennis v. Boundary County, 2010 WL 2813361 (D. Idaho July 15, 2010) (holding on a summary judgment motion on a retaliation claim that the "element of causation [is] purely a question of fact.) Thereby, there is, at the very least, material questions of fact surrounding the timing and motive/intent of those adverse actions which only took place after Ms. Hatheway reported her beliefs that she was suffering from age discrimination; this then must necessarily preclude summary judgment.

E. There are genuine issues of material fact which should have precluded summary judgment on Ms. Hatheway's negligent infliction of emotional distress claim.

The District Court improperly dismissed Ms. Hatheway's negligent infliction of emotional distress claim because it found the University did not engage in age discrimination, hostile work environment, or retaliation, and as result, found that there was no duty that was

breached. The District Court's determination on this issue was wrong because Ms. Hatheway clearly raises genuine issues of material facts on her age discrimination, hostile work environment, and retaliation claims. Thereby, according to the District Court's own logic and analysis in granting summary judgment, summary judgment on appeal must be reversed.

Moreover, Ms. Hatheway's negligent infliction of emotional distress claim arises out of the *tortious* conduct involved in the age discrimination, the hostile work environment, retaliation and constructive discharge by the wrongful handling of the allegations of her alleged misconduct and the failure by the University to act with care towards Ms. Hatheway. In wrongful discharge cases, claims of infliction of emotional distress are allowed if the facts of the case support such a claim in addition to the other claims. See, e.g., Olson v. EG & G Idaho, Inc., 134 Idaho 778, 783-84, (2000); Thomas v. Med. Ctr. Physicians, P.A., 138 Idaho 200, 211 (2002).

Ms. Hatheway's claim of NIED is rooted in the false and pretextual documents and statements contained in her evaluations, along with the University's tortious conduct towards Ms. Hatheway by the harmful words and conduct/actions taken against her. Defendants have a common law duty of due care to not cause harm and damages to Ms. Hatheway. The University breached its duties to Ms. Hatheway by their wrongful tortious conduct, which caused physical manifestations of Ms. Hatheway's emotional distress. Therefore, summary judgment on Ms. Hatheway's negligent infliction of emotional distress claim should not have been granted.

V. CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's Order granting the Defendants-Respondents the University of Idaho's motion for summary judgment and dismissing all of Ms. Hatheway's claims, and remand the case back to District Court for trial on the merits of her claims.

DATED this 25th day of May, 2012.

SCOTT A. GINGRAS, ISB No. 7808
WINSTON & CASHATT, LAWYERS,
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and complete copy of the foregoing to be ☒ mailed, postage prepaid; ☐ hand delivered; ☐ sent via facsimile on May 25, 2012, to:

Idaho Supreme Court
Stephen W. Kenyon, Clerk of the Court
P.O. Box 83720
Boise, ID 83720-0101

Honorable Judge Jeff Brudie
District Judge, Presiding
Nez Perce County District Court
1230 Main Street
P.O. Box 896
Lewiston, ID 83501

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Sharon M. Carvo

126 Idaho 745
Supreme Court of Idaho,
Twin Falls, November 1994 Term.

Blanca Estela AVILA, individually and as parent and natural guardian of Selma Manriquez and Fernando Manriquez, children under 18 years of age, Plaintiff–Appellant,
v.
Dale Brent WAHLQUIST and the State of Idaho Department of Health and Welfare, a governmental agency, Defendants–Respondents.

No. 21070. \| Feb. 23, 1995.

Motorist injured in collision with vehicle driven by state employee brought action against state under Tort Claims Act. After state moved for summary judgment based on failure to provide notice within 180 days as required by Act, motorist moved to compel discovery, and the Fifth Judicial District Court, Cassia County, J. William Hart, J., denied motorist's motion to compel pending resolution of state's motion and subsequently granted summary judgment. Motorist appealed, and the Supreme Court, Silak, J., held that: (1) claim was barred due to motorist's failure to give notice even though state insurance adjuster had notice that motorist intended to seek medical attention for injuries; (2) fact that motorist was illiterate in English did not affect applicability of notice requirement; and (3) trial court did not abuse discretion in suspending discovery pending resolution of potentially dispositive motion.

Affirmed.

West Headnotes (7)

[1] **Appeal and Error**
⇐Extent of Review Dependent on Nature of Decision Appealed from

On appeal from order of summary judgment, standard of review is same as standard used by district court in ruling on motion for summary judgment. Rules Civ.Proc., Rule 56(c).

15 Cases that cite this headnote

[2] **Appeal and Error**
⇐Judgment

In reviewing order of summary judgment, court liberally construes record in light most favorable to party opposing motion, drawing all reasonable inferences and conclusions in that party's favor. Rules Civ.Proc., Rule 56(c).

18 Cases that cite this headnote

[3] **Automobiles**
⇐Notice of claim for injury

Claim by motorist injured in collision with state employee against state under Tort Claims Act was barred where motorist failed to provide notice to state within 180 days as required by Act, even though insurance adjuster for state was aware that motorist was considering seeking medical treatment within one week after accident and motorist was illiterate in English and could not read notice sent to her by state shortly after accident informing her of steps required to bring claim under Act. I.C. § 6–905.

[4] **States**
⇐Form and sufficiency

Notice of potential insurance claim does not constitute notice to state of claim against state and its employees for any act or omission of employee within course or scope of his employment as required by Tort Claims Act. I.C. § 6–905.

1 Cases that cite this headnote

[5] **Municipal Corporations**

Excuses For, and Relief From, Delay or Failure

Insurance company's awareness of accident or medical expenses does not relieve claimant of burden to file timely notice of tort claim with appropriate governmental entity in order to recover under Tort Claims Act. I.C. § 6–905.

2 Cases that cite this headnote

[6] **Pretrial Procedure**
Discretion of court

Control of discovery is within discretion of trial court.

2 Cases that cite this headnote

[7] **Pretrial Procedure**
Sequence and timing; condition of cause

Trial court did not abuse its discretion in suspending discovery in action under Tort Claims Act pending resolution of potentially dispositive motion for summary judgment based on claimant's failure to provide notice to state of claim within 180 days as required by Act where claimant admittedly took no steps during 180 days after accident to notify state of claim other than speaking to state insurance adjuster and information sought through discovery was immaterial to motion for summary judgment. I.C. § 6–905.

3 Cases that cite this headnote

Attorneys and Law Firms

****332 *746** Raymundo Peña, Rupert, for appellant.

Larry EchoHawk, Atty. Gen. and Hall, Farley, Oberrecht & Blanton, Boise, for respondents. Steven J. Hippler, argued.

Opinion

SILAK, Justice.

This is an appeal from an order granting summary judgment and dismissing with prejudice the appellant's tort action against the State of Idaho and its employee arising out of an automobile accident. The district judge held that the appellant failed to serve a notice of tort claim on the State of Idaho within the 180 day time limit as required by the Idaho Tort Claims Act. The appellant also appeals from an order denying a motion to compel production of documents and granting the respondents' motion for a protective order. We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

On August 19, 1991, the appellant Blanca Estela Avila and her children, Selma Manriquez and Fernando Manriquez (collectively Avila) were involved in a traffic accident when a vehicle driven by respondent Dale Brent Wahlquist (Wahlquist) rear-ended Avila's vehicle. Wahlquist was an employee of respondent Idaho Department of Health and Welfare (H & W), and was driving a state-owned vehicle while returning from state business at the time of the accident (Wahlquist and H & W collectively respondents).

Within a week of the accident, Kris Michalk (Michalk), an insurance adjuster hired by the state's Bureau of Risk Management, visited Avila's home to take her statement and photographs of her automobile. According to Avila's affidavit:

> ... in the course of the representative's investigation, the representative asked me questions regarding the occurrence of the traffic collision and informed me that the State would be handling the damages which had occurred to me.... [D]uring ****333 *747** our conversation, I informed the representative that I had not been feeling well as a result of the accident and that I would be seeking medical treatment.

Following this meeting, Michalk wrote to Avila, in a letter dated August 27, 1991, informing her that if she wished to make a claim against the state of Idaho, she needed to fill out and file a notice of tort claim with the Idaho Secretary of State's office. The letter also notified Avila that the notice had to be filed within 180 days of the accident.

Michalk enclosed a notice of tort claim form with the letter. Avila claims she is illiterate in the English language and did not understand the adjuster's instructions regarding filing a written claim.

Avila filed a tort claim notice with the Secretary of State's office on May 28, 1992, approximately nine months after the accident, and filed a complaint for damages in September 1992. In answering the complaint, respondents raised the affirmative defense that Avila failed to file a timely tort claim notice pursuant to the Idaho Tort Claims Act, and later filed a motion for summary judgment. Thereafter, Avila filed a discovery request seeking, among other things, a copy of all investigative reports, memoranda, documents, and photographs executed by any employee of H & W regarding the adjustment of Avila's claim. Respondents objected to this request on the grounds that these items were protected from discovery pursuant to the attorney/client privilege, and by the work product doctrine, as these items belonged in the claim file of the Bureau of Risk Management. Avila filed a motion to compel production of the requested documents, and a notice of deposition by subpoena duces tecum of Michalk, requiring her to bring with her to the deposition the specified documents. Respondents filed a motion for protective order to prevent the deposition of Michalk.

Following a hearing in June 1993, the district court denied Avila's motion to compel and provisionally granted respondents' motion for protective order pending resolution of respondents' motion for summary judgment. After hearing arguments on the motion for summary judgment, the district court issued its Opinion and Order on October 21, 1993, granting the motion. Avila appeals both the order denying the motion to compel, and the order granting summary judgment.

II.

STANDARD OF REVIEW

[1] [2] In an appeal from an order of summary judgment, this Court's standard of review is the same as the standard used by the district court in ruling on the motion for summary judgment. *East Lizard Butte Water Corp. v. Howell,* 122 Idaho 679, 681, 837 P.2d 805, 807 (1992). On review, this Court liberally construes the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party's favor. *Farm Credit Bank of Spokane v. Stevenson,* 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994). Summary judgment shall be granted if the court determines that "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c).

III.

180–DAY NOTICE REQUIREMENT

The Idaho Tort Claims Act states that "[n]o claim or action shall be allowed against a governmental entity or its employee unless the claim has been presented and filed within the time limits prescribed by this act." I.C. § 6–908. The Act establishes a 180–day time limit to file a claim:

> All claims against the state arising under the provisions of this act and all claims against an employee of the state for any act or omission of the employee within the course or scope of his employment shall be presented to and filed with the secretary of state within one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered, whichever is later.

I.C. § 6–905. All such claims must "accurately describe the conduct and circumstances ****334 *748** which brought about the injury or damage, describe the injury or damage, state the time and place the injury or damage occurred, state the names of all persons involved, if known, and shall contain the amount of damages claimed, together with a statement of the actual residence of the claimant...." I.C. § 6–907.

The accident occurred on August 19, 1991. The notice of tort claim was filed with the state on May 28, 1992, over nine months later. Accordingly, Avila's claim is barred unless she gave some other notice within the 180 day time period. Avila argues that the state knew of the existence of the accident and sent an adjuster to investigate the claim, and therefore, the state was on notice and was not prejudiced in its ability to investigate or process the claim. Avila argues that written or oral notice may be sufficient to satisfy the notice provisions of I.C. § 6–905 as long as the State is not prejudiced by the manner of imparting notice. *Citing Huff v. Uhl,* 103 Idaho 274, 647 P.2d 730 (1982); *Sysco Intermountain Food Serv. v. City of Twin Falls,* 109 Idaho 88, 705 P.2d 548 (Ct.App.1985).

[3] This Court recently rejected a similar argument in *Friel v. Boise City Housing Authority,* 887 P.2d 29 (Idaho 1994).

In *Friel,* we affirmed summary judgment against the claimant, holding that the claimant's actions of notifying the governmental entity's insurance company of her accident and medical expenses failed to satisfy the notice filing requirements regarding claims against political subdivisions set out in I.C. § 6–906 which requirements are virtually identical to those of I.C. § 6–905. *Id.* at 31. In *Friel,* we declined to follow *Sysco,* and stated that the reference to *Sysco* in *Pounds v. Denison,* 120 Idaho 425, 816 P.2d 982 (1991), was dicta:

> The holding in *Sysco,* that notice of a potential claim to a governmental entity's insurer constitutes substantial compliance with the ITCA notice requirements, was not necessary to the disposition of *Pounds,* and the reference in that opinion to the *Sysco* rationale was dicta.

Friel at 31. Likewise, Avila's reliance on *Huff* is unavailing. The claimant in *Huff* went to the governmental entity and presented written repair estimates, discussed the claim with the secretary treasurer of the governmental entity, and followed up with at least two telephone calls. The *Huff* court held that the governmental entity "was clearly apprised of the fact that a claim was being prosecuted against it, and the amount thereof." *Huff, supra,* 103 Idaho at 276, 647 P.2d at 732. By contrast, Avila never notified the state that she was pursuing a tort claim and the amount thereof, within the 180 day period. Avila's alleged statements to the adjuster that she had not been feeling well as a result of the accident and would be seeking medical treatment were insufficient to "provide notice that she intended to go a step farther by bringing a tort claim." *Pounds, supra,* 120 Idaho at 427, 816 P.2d at 984.

[4] [5] Further, this Court has rejected the argument that notice of a potential *insurance* claim constitutes notice of a potential tort claim sufficient to satisfy I.C. § 6–906. *Stevens v. Fleming,* 116 Idaho 523, 530–31, 777 P.2d 1196, 1203–04 (1989). The same analysis applies under I.C. § 6–905. An insurance company's awareness of an accident or medical expenses does not relieve a claimant of the burden to file a timely notice of tort claim with the appropriate governmental entity.

The fact that Ms. Avila is or may be illiterate in the English language does not change the analysis. The statute employs a reasonableness standard. I.C. § 6–905 (180 "days from the date the claim arose or reasonably should have been discovered"); *McQuillen v. City of Ammon,* 113 Idaho 719, 722, 747 P.2d 741, 744 (1987) ("Knowledge of facts which would put a reasonably prudent person on inquiry is the equivalent to knowledge of the wrongful act and will start the running of the 120–day period.") The letter dated August 27, 1991 from the insurance adjuster advising Avila of the necessity of filing a notice of tort claim, even if Avila was unable to read it, was sufficient to put Avila on inquiry notice as to the contents of the letter. The district court properly granted summary judgment in favor of respondents for Avila's failure to file a timely notice of tort claim.

****335 *749 IV.**

MOTION TO COMPEL

Avila also contends that the district court erred in granting provisionally respondents' motion for a protective order and denying Avila's motion to compel, pending resolution of the motion for summary judgment. Avila sought access to the claim file of the Bureau of Risk Management to determine what the state knew and the extent it was put on notice.

[6] [7] Control of discovery is within the discretion of the trial court. *Service Employees Int'l v. Idaho Dep't. of H & W,* 106 Idaho 756, 761, 683 P.2d 404, 409 (1984). We find no abuse of discretion in the district court's decision to suspend discovery pending resolution of the potentially dispositive summary judgment motion. Avila admittedly took no affirmative steps during the 180 days after the accident to notify the state of her tort claim, other than speaking with Ms. Michalk when she investigated the accident. The information in the claim file would be immaterial to the motion to dismiss, because an insurance company's information about an accident or medical expenses does not relieve a claimant of the burden to file a timely notice of tort claim with the appropriate governmental entity.

V.

CONCLUSION

The district court's orders which granted summary judgment in favor of respondents, and provisionally granted respondents' motion for a protective order and denied Avila's motion to compel are affirmed. In view of our disposition of this case, we need not reach the other issues and arguments raised by the parties on appeal. Costs on appeal to respondents.

McDEVITT, C.J., JOHNSON and TROUT, JJ., and WOODLAND, J. Pro Tem., concur. 890 P.2d 331

Parallel Citations

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119 Idaho 539
Supreme Court of Idaho,
Twin Falls Nov. 1990 Term.

Ronald T. BONZ and Ruth I. Bonz, husband and wife; Elbert L. Haye and Margaret T. Haye, husband and wife; Stanley V. Haye, Sr. and Joyce Ann Haye, husband and wife; Larry Hughes and Leslie L. Hughes, husband and wife; Stanley V. Haye, Jr. and Patricia E. Haye, husband and wife; and Jack A. Gibson, all individually, Plaintiffs–Appellants,
v.
Jay D. SUDWEEKS, J. Dee May, Jon J. Shindurling, Mark Stubbs, and L. Jay Mitchell, individually and as partners of Sudweeks, May, Shindurling, Stubbs & Mitchell, a partnership and Sudweeks, May, Shindurling, Stubbs and Mitchell, a partnership, Defendants–Respondents.

No. 18335. | March 29, 1991.

Suit was brought alleging professional malpractice. The District Court of the Fifth Judicial District, Jerome County, W.H. Woodland, J., granted summary judgment in favor of the defendant attorneys on ground that the action was barred by the statute of limitations, and the plaintiffs appealed. The Supreme Court, Boyle, J., held that existence of a cloud on title to real property which continued because of a failure to properly record a release of lis pendens was not sufficient damage for a professional malpractice action to accrue; rather, damage did not occur, and cause of action did not accrue, until investor learned of cloud on the property and thereafter refused to participate in a venture to develop the property.

Reversed and remanded.

West Headnotes (2)

[1] **Limitation of Actions**
Negligence in Performance of Professional Services

There must be "some damage" before professional malpractice action accrues and limitation period begins to run. I.C. § 5–219, subd. 4.

17 Cases that cite this headnote

[2] **Limitation of Actions**
Negligence in Performance of Professional Services

Existence of a cloud on title to real property which continued because of a failure to properly record a release of lis pendens was not sufficient damage for a professional malpractice action to accrue; rather, damage did not occur, and cause of action did not accrue, until investor learned of cloud on the property and thereafter refused to participate in a venture to develop the property. I.C. § 5–219, subd. 4.

48 Cases that cite this headnote

Attorneys and Law Firms

****876 *539** David W. Thompson, Jerome, for plaintiffs-appellants.

Eberle, Berlin, Kading, Turnbow & McKlveen, Boise, for defendants-respondents. Bradley G. Andrews argued.

Opinion

BOYLE, Justice.

In this appeal we are called upon to determine whether the existence of a cloud on the title to real property which continued ****877 *540** because of a failure to properly record a release of lis pendens is sufficient damage for a professional malpractice action to accrue.

The trial court granted defendant's motion for summary judgment and dismissed plaintiffs' case on the basis that the action had accrued at the time the cloud on title was allowed to remain and the two-year statute of limitations in I.C. § 5–219(4) had expired prior to plaintiffs filing their complaint. For reasons set forth herein, we reverse the summary judgment and remand for further proceedings.

The plaintiffs in this action were owners of real property located in Jerome County, Idaho, at the intersection of Interstate 84 and State Highway 93, and were former clients of the attorneys and law firm named as defendants. In early 1985, several real property transactions and exchanges involving land in Lincoln County and Jerome County, Idaho, occurred which resulted in litigation and, relative to the instant appeal, the filing and recording of a lis pendens on real property located in Jerome County.

Defendants in this action were attorneys retained in that prior case to provide legal services to plaintiffs herein related to the real property transactions and resulting litigation. Negotiations between the parties in that prior action resulted in settlement of the controversy and the attorneys prepared settlement and dismissal documents, together with a release of lis pendens intended to be recorded in Jerome County. Following settlement of the controversy a paralegal at defendants' law office mailed the release of lis pendens to Lincoln County where it was recorded. Unfortunately, the original lis pendens sought to be released had been recorded in Jerome County and not in Lincoln County. As a result, the original lis pendens filed in Jerome County was not released and continued to be a cloud on the title to plaintiffs' property.

In March, 1987, the cloud on the title of plaintiffs' Jerome County real property was discovered by a third-party investor who had intended to invest $300,000.00 in the development of that property. As a result of the unreleased lis pendens remaining on the county records, the third-party investor refused to participate or have any further involvement in the development of plaintiffs' Jerome County property. The third-party investor did not advise plaintiffs that the presence of the lis pendens was the reason for withdrawing his offer of financial support for development of the property. As a result, plaintiffs were unable to obtain financing for the project.

In January, 1988, plaintiffs were not able to meet financial obligations on a note secured by the Jerome County property and a foreclosure action was commenced. In April, 1988, it was discovered by the parties to this action that the release of lis pendens had been recorded by the attorneys in the wrong county. On January 6, 1989, this action for damages alleging professional malpractice was filed.

The following dates and events are crucial to the issues presented in this appeal:

> March 13, 1986 Release of Lis Pendens recorded in Lincoln County
>
> March, 1987 Third party investor learns of Lis Pendens on Jerome County records and withdraws offer of $300,000.00 financial investment in plaintiffs' property
>
> April, 1988 Plaintiffs discover Lis Pendens has not been released from Jerome County records
>
> January 6, 1989 Complaint in this action filed seeking damages for professional malpractice

The trial court granted defendants' motion for summary judgment on the basis that the two-year statute of limitations in I.C. § 5-219(4) had expired prior to the complaint being filed on January 6, 1989, because plaintiffs had been damaged at the time of recording the release of lis pendens in the wrong county on March 13, 1986. As a result of the cloud remaining on the title to the Jerome County property on March 13, 1986, the trial court held that plaintiffs could not freely transfer the property and their action had accrued at that time.

****878 *541** For reasons set forth herein, we reverse the trial court's granting of summary judgment and remand the action for further proceedings.

I.

STANDARD FOR REVIEW—SUMMARY JUDGMENT

"A motion for summary judgment shall be rendered forthwith if the pleading, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c); *Rawson v. United Steelworkers of Am.*, 111 Idaho 630, 726 P.2d 742 (1986); *Schaefer v. Elswood Trailer Sales*, 95 Idaho 654, 516 P.2d 1168 (1973). Standards applicable to summary judgment require the district court and Supreme Court upon review, to liberally construe facts in the existing record in favor of the nonmoving party, and to draw all reasonable inferences from the record in favor of the nonmoving party. *Tusch Enters. v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987); *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986); *Kline v. Clinton*, 103 Idaho 116, 645 P.2d 350 (1982); *Palmer v. Idaho Bank & Trust of Kooskia*, 100 Idaho 642, 603 P.2d 597 (1979). "[M]otions for summary judgment should be granted with caution." *Bailey v. Ness*, 109 Idaho 495, 497, 708 P.2d 900, 902 (1985); *Steele v. Nagel*, 89 Idaho 522, 528, 406 P.2d 805, 808 (1965). If the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment must be

denied. *Kline v. Clinton,* 103 Idaho 116, 645 P.2d 350 (1982); *Farmers Ins. Co. of Idaho v. Brown,* 97 Idaho 380, 544 P.2d 1150 (1976); *Stewart v. Hood Corp.,* 95 Idaho 198, 506 P.2d 95 (1973).

II.

PROFESSIONAL MALPRACTICE—ACCRUAL OF ACTION

This is an action based on professional malpractice. *Griggs v. Nash,* 116 Idaho 228, 775 P.2d 120 (1989). The applicable statute of limitations contained in I.C. § 5–219(4), provides that an action to recover damages for professional malpractice must be commenced within two years. Idaho Code § 5–219(4) provides in pertinent part:

> 4. An action to recover damages for professional malpractice, ... shall be deemed to have accrued as of the time of the occurrence, act or omission complained of, and the limitation period shall not be extended by reason of any continuing consequences or damages resulting therefrom or any continuing professional or commercial relationship between the injured party and the alleged wrongdoer, ...

[1] Although not stated in the statute, this Court has interpreted the law to require "some damage" before the action accrues and the limitation period begins to run. *Griggs v. Nash,* 116 Idaho 228, 775 P.2d 120 (1989).1 As noted by a unanimous Court in *Griggs v. Nash:*

> Having resolved that I.C. § 5–219(4) is the applicable statute of limitations in this case, we must then determine when the action accrued. The statute provides that actions for professional malpractice accrue "as of the time of the occurrence, act or omission complained of." If we were to apply the statute strictly, the claims ... would clearly be barred. The alleged acts or omissions ... occurred in May 1984. Since the third-party complaint was not filed until September of 1987, the statute would bar the claims. However, in *Streib v. Veigel,* 109 Idaho 174, 706 P.2d 63 (1985), *this Court extended the date for the accrual of actions* ****879 *542** *for professional malpractice where the negligence is continuing, until the date that damage occurred.*
> 116 Idaho at 232, 775 P.2d at 124. (Emphasis added.)

The requirement of "some damage" as a necessary element to accrual of an action for statute of limitation purposes was also addressed in *Treasure Valley Bank v. Killen & Pittenger, P.A.,* 112 Idaho 357, 732 P.2d 326 (1987).

> This Court has dealt with the question of professional malpractice in a number of recent cases. These cases point out that while I.C. § 5–219(4) points out that "the cause of action shall be deemed to have accrued as of the time of the occurrence, act or omission complained of ...," nevertheless *until some damage occurs no cause of action accrues for professional malpractice,* even though the "occurrence, act or omission complained of," which ultimately causes the damages, has occurred earlier.
> 112 Idaho at 359, 732 P.2d at 328.2

[2] The trial court held that the presence of the cloud on the title to the Jerome County property constituted sufficient damage for the plaintiffs' action to accrue and since the complaint for professional malpractice was filed on January 6, 1989, more than two years after March 13, 1986, when the release was filed in the wrong county, the action was barred by the statute of limitations.

The legal issue presented in the instant appeal is somewhat similar to that presented in *Griggs v. Nash,* wherein we first had occasion to define what "damage" is for purposes of determining when the statute of limitations in I.C. § 5–219(4) begins to run. The precise issue presented here is whether the presence of the lis pendens as a cloud on the title in and of itself, without some related or actual damage to plaintiffs, is sufficient to cause the action to accrue. Under the particular facts of this case we hold that the cloud on the title is not damage sufficient to cause the action to accrue.

Unlike *Griggs* and its predecessors the damage in this instant appeal is not as easily ascertainable and determined. In *Griggs,* the plaintiffs' damage was in the form of expenses actually incurred for attorney fees. In the early case of *Stephens v. Stearns,* 106 Idaho 249, 678 P.2d 41 (1984), an action for architect malpractice, the plaintiff suffered personal injury when she fell down an interior stairway in an apartment complex. In *Blake v. Cruz,* 108 Idaho 253, 698 P.2d 315 (1985), an action for medical malpractice alleging negligent diagnosis of rubella, the damage occurred at the time the infant was born with congenital defects. In *Streib v. Veigel,* 109 Idaho 174, 706 P.2d 63 (1985), an action for accounting malpractice, the action did not accrue until an IRS assessment caused damage to the taxpayers. In *Mack Fin. Corp. v. Smith,* 111 Idaho 8, 720 P.2d 191 (1986), an action for accounting malpractice, the action did not accrue until damage occurred after bankruptcy proceedings when it first became apparent that the creditor plaintiff would not be

able to recover. In *Treasure Valley Bank v. Killen & Pittenger, P.A.*, 112 Idaho 357, 732 P.2d 326 (1987), an action for legal malpractice, the action accrued for statute of limitation purposes when plaintiff lost its opportunity to secure post-bankruptcy confirmation interest on a secured claim.

All of the above-cited cases have a common thread. The damage, for statute of limitation purposes, occurred long after the negligent act. The most poignant example is in *Stephens v. Stearns,* where the personal injury occurred several years after the negligent design of the stairway.

Applying the principles and rules of our case law to the record before us, we conclude ****880 *543** that the proposed action against defendants accrued in March, 1987. Our review of the record clearly demonstrates that the damage to plaintiffs did not occur when the release of lis pendens was mistakenly recorded in Lincoln County. Rather, the damage occurred in March, 1987, when the investor learned of the cloud on the Jerome County property and thereafter refused to participate in a venture to develop the property. It was at the time the investor refused to participate financially in the property development that plaintiffs were damaged, rather than at the time the release was inadvertently filed in the wrong county.

The determination of what constitutes "damage" for purposes of accrual of an action must be decided on the circumstances presented in each individual case. In the instant case there is no dispute as to dates or events involved in the recording of the release of lis pendens or filing of plaintiffs' action. Based on our review of the record we hold that plaintiffs had suffered no damage, as contemplated in I.C. § 5–219(4) and our case law, until the investor withdrew his financial support from the proposed development venture.

III.

CONCLUSION

Under the rule established and adopted in *Stephens v. Stearns,* and refined in our other cases, we therefore hold that plaintiffs did not suffer damages, as contemplated in I.C. § 5–219(4), and their action did not accrue until withdrawal of the investor's financial support in March, 1987. Accordingly, the two-year statute of limitations of I.C. § 5–219(4) does not bar plaintiffs' action for alleged professional malpractice because their complaint was filed within two years of the date the financing was withdrawn.

We reverse the trial court's entry of summary judgment and remand. Costs to appellants. No attorney fees awarded on appeal.

BAKES, C.J., and BISTLINE, JOHNSON and McDEVITT, JJ., concur.

Parallel Citations

808 P.2d 876

Footnotes

1 The requirement of "some damage" before an action accrues has its origin in *Stephens v. Stearns,* 106 Idaho 249, 678 P.2d 41 (1984). In *Stephens* this Court stated, "[a]s a general rule the statute of limitations does not begin to run against a negligence action until *some damage* has occurred. W. Prosser, *Handbook of the Law of Torts* § 301 (4th ed. 1971)." (Emphasis added.) 106 Idaho at 254, 678 P.2d 41.

2 The recent cases referred to in *Treasure Valley v. Killen & Pittenger, P.A.*, are *Mack Fin. Corp. v. Smith,* 111 Idaho 8, 720 P.2d 191 (1986) (accountant malpractice); *Streib v. Veigel,* 109 Idaho 174, 706 P.2d 63 (1985) (accountant malpractice); *Blake v. Cruz,* 108 Idaho 253, 698 P.2d 315 (1985) (physician medical malpractice); *Stephens v. Stearns,* 106 Idaho 249, 678 P.2d 41 (1984) (architect malpractice). In all of these professional malpractice cases, the Court has required some damage to the plaintiff before the action accrues and the applicable statute of limitations begins to run.

120 Idaho 452
Court of Appeals of Idaho.

Alfred J. BOWEN and Cheryl A. Bowen, husband and wife, Plaintiffs-Respondents, v. David J. HETH, Defendant-Appellant.

No. 18326. | Aug. 2, 1991. | Petition for Review Denied Oct. 3, 1991.

Prospective vendors sought release of funds held in escrow. The First Judicial District Court, Kootenai County, Richard G. Magnuson, J., granted partial summary judgment for vendors, and purchaser appealed. The Court of Appeals, Winmill, J. pro tem., held that prospective vendors of property were entitled to return of funds escrowed to protect potential purchaser from sale to third party while he investigated property's development potential, when purchaser failed to make offer within requisite 90 days, notwithstanding vendors' alleged failure to provide purchaser with information necessary for his investigation, where agreement did not expressly condition return of funds upon vendors' cooperation.

Affirmed.

West Headnotes (3)

[1] **Vendor and Purchaser**
⇐Grounds for Recovery of Payments

Prospective vendors of property were entitled to return of funds escrowed to protect potential purchaser from sale to third party while he investigated property's development potential, when purchaser failed to make offer within requisite 90 days, notwithstanding vendors' alleged failure to provide purchaser with information necessary for his investigation, where agreement did not expressly condition return of funds upon vendors' cooperation.

[2] **Appeal and Error**
⇐Certificate as to Grounds

Failure to issue interlocutory appeal certificate until after request for certification was made by appellant and his motion was heard by court was not abuse of discretion. Rules Civ.Proc., Rule 54(b).

[3] **Costs**
⇐Attorney Fees on Appeal or Error

Breach of contract plaintiffs who prevailed on interlocutory appeal taken by defendant were entitled to recover attorney fees even though defendant might ultimately be found to be prevailing party after trial on his counterclaim. I.C. § 12-120(3).

Attorneys and Law Firms

****1009 *452** Frederick G. Loats, Coeur d'Alene, for defendant-appellant.

Lukins & Annis, Coeur d'Alene, for plaintiffs-respondents. Edward M. Kok, argued.

Opinion

WINMILL, Judge, Pro Tem.

This is an appeal from a certified, partial summary judgment ordering the release of funds held in escrow. For reasons explained below, we affirm.

Alfred Bowen and Cheryl Bowen own real property located in Coeur d'Alene, adjacent to the Spokane River, and commonly known as the Harbor Center. In early 1987, David Heth made inquiries about purchasing the property, but determined that before making an offer he would require time to further investigate the property ****1010 *453** and its development potential. Concerned that the property might be sold to a third party after he had

expended considerable time and money in his investigation, Heth persuaded the Bowens to enter into an escrow agreement which would protect him from such an eventuality.

The agreement required that Heth immediately commence an investigation of the property and that the Bowens cooperate with that investigation. The agreement also provided that the Bowens would, upon execution of the agreement, deposit $22,500 in an escrow account. The agreement detailed the disposition of the escrowed funds. In the event Heth failed to make an offer within ninety days or made an offer within that time frame which was later consummated, the escrow would be closed and the funds returned to the Bowens. On the other hand, if an offer was made by a third party during the same ninety-day period which resulted in a sale of the property, or Heth made a reasonable offer which was rejected by the Bowens, then the funds would be disbursed to Heth. The agreement also provided that any dispute between the parties as to whether Heth's offer was "reasonable" would be resolved by arbitration.

Heth did not make an offer within ninety days. The Bowens then filed this action to obtain an order directing the escrow agent to disburse the funds to the Bowens. Heth filed a counterclaim, alleging that the Bowens failed to supply him with information necessary to value the property, and thereby breached the provision of the agreement which required that the Bowens cooperate with Heth in his investigation of the property. The counterclaim requested that judgment be entered against the Bowens for $22,500.

The Bowens moved for partial summary judgment on their claim for the return of the funds. Following a hearing, the motion was granted and the escrow agent was directed to close the escrow and return the funds to the Bowens. Heth then filed an objection to the court's order, requesting a modification of the language used by the court or a certification of the order for immediate appeal pursuant to I.R.C.P. 54(b). The court granted the latter request and a Rule 54(b) certification was attached to the partial summary judgment. This appeal followed.

Heth raises two issues on appeal. First, he contends that the district court erred in granting partial summary judgment in the face of his contention that the Bowens had violated an express provision of the contract. Second, Heth argues that the district court erred in failing to initially attach a Rule 54(b) certificate to the order granting partial summary judgment. For the reasons stated below, we find no merit in either contention and affirm the decision of the district court.

On review of an order granting summary judgment, our task is to determine whether there are genuine issues of material fact and, if not, whether the prevailing party was entitled to judgment as a matter of law. I.R.C.P. 56(c); *Lupis v. Peoples Mortgage Co.*, 107 Idaho 489, 690 P.2d 944 (Ct.App.1984). In this case, the facts crucial to the district court's decision were undisputed. The agreement provided that the funds would be returned to the Bowens if Heth failed to make an offer for the property within ninety days. It was undisputed that Heth failed to make such an offer. Thus, the court determined that, as a matter of law, the Bowens were entitled to a return of the funds.

[1] Heth contends, however, that the Bowens were not entitled to the funds because they allegedly breached an express provision of the agreement by failing to provide him with information necessary for his investigation. Nothing in the express language of the agreement supports Heth's argument. While the agreement did require that the Bowens cooperate in the investigation, compliance with that requirement was not stated as a condition of the return of the funds. Rather, the agreement was clear and specific that on the ninety-first day after the agreement was executed, the funds would be returned to the Bowens if Heth had not made an offer on the property. The agreement imposed no other condition for the return of the ****1011 *454** funds. Absent fraud or overreaching, which has not been alleged here, the courts cannot modify the express terms of an agreement upon which competent parties have agreed. *Lupis v. Peoples Mortgage Co., supra; Knoke v. Charlebois*, 107 Idaho 427, 690 P.2d 362 (Ct.App.1984). *See also Abel v. School District No. 413*, 108 Idaho 982, 703 P.2d 1357 (Ct.App.1985).

Heth argues that even if the agreement does not expressly so provide, it is a necessary implication of the agreement that the Bowens would not be entitled to a return of the funds if they failed to cooperate with Heth's investigation. Relying on our Supreme Court's decision in *Davis v. Professional Business Services, Inc.*, 109 Idaho 810, 712 P.2d 511 (1985), Heth suggests that such a proviso can be read into the contract as part of an implied covenant of good faith and fair dealing. While the Supreme Court in *Davis* recognized that a contract should be construed to include such implied provisions as are necessary to effectuate the intention of the parties, the Court also suggested that such terms may only be implied where the contract is silent on the issue in question. *Id.* at 813-14, 712 P.2d at 514-15. Here, the agreement is explicit in stating that the funds must be returned to the Bowens if Heth failed to make an offer on the property within the agreed-upon time frame. No other conditions were imposed. The Court cannot accept Heth's invitation to read additional conditions into the agreement by implication, because to do so would contradict the parties' clearly

stated intent.

In summary, we conclude that the parties' agreement did not expressly condition the return of the funds upon the Bowens' cooperation with Heth's investigation of the property. Nor can such a condition be implied as necessary to effectuate the intent of the parties. Heth is still able to pursue his counterclaim against the Bowens for breach of contract. However, he is not entitled to prevent the close of the escrow and the return of the funds while that claim is resolved in further court proceedings.

[2] Heth also contends that the district court erred in permitting disbursement of the funds without issuing a Rule 54(b) certificate so as to provide Heth with a means to appeal or stay the court's order. However, decisions concerning Rule 54(b) certification are committed to the sound discretion of the district court and will not be reversed on appeal unless the court's decision amounts to an abuse of discretion. *Robertson v. Richards,* 118 Idaho 791, 800 P.2d 678 (Ct.App.1990); *Snake River Equipment Co. v. Christensen,* 107 Idaho 541, 691 P.2d 787 (Ct.App.1984). Such orders are not to be entered routinely, and certification should be granted only upon a showing of hardship, injustice or other compelling reasons. *Pichon v. L.J. Broekemeier, Inc.,* 99 Idaho 598, 586 P.2d 1042 (1978); *Robertson v. Richards, supra.* Here a Rule 54(b) certificate was issued, but not until after a request for certification was made by Heth and Heth's motion was heard by the court. We cannot fault the district court for declining to issue a Rule 54(b) certificate until a request and an appropriate showing of necessity was made. Accordingly, we find no error by the district court on this issue.

[3] The Bowens have prevailed on each of the issues raised by the appellant Heth in this appeal and they are entitled to costs. The Bowens have requested that they be awarded their attorney fees on appeal under I.C. § 12-120. The subject matter of this lawsuit falls under the definition of a "commercial transaction" as defined by I.C. § 12-120(3) and as shown by the contract between the parties. This action was brought upon the contract to enforce one party's rights under the contract. Accordingly, the statute mandates that "the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs." I.C. § 12-120(3); I.A.R. 40, 41.

We recognize that the appeal came to us upon a partial summary judgment, certified by the trial court to be final for the purposes of appeal. The issues of the defendant's counterclaim have yet to be decided and the Bowens may not ultimately be the ****1012 *455** prevailing party in the case. Nevertheless, Heth chose to seek appellate review on limited issues before the case was fully decided. The Bowens were entitled to respond and their position has been fully upheld on the limited issues presented by the appeal. Accordingly, we hold they are entitled to an award of fees for this appeal even though Heth may ultimately be found to be the prevailing party after trial on his counterclaim.

In summary, we affirm the partial summary judgment ordering disbursement of the escrowed funds to the Bowens. Costs and fees to the respondents, as stated above.

WALTERS, C.J., and SWANSTROM, J., concur.

Parallel Citations

816 P.2d 1009

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100 Idaho 808
Supreme Court of Idaho.

Donna BOWLES, Plaintiff-Appellant,
v.
Marshal T. KEATING and Moscow Public School District No. 281, Defendants-Respondents.

No. 12524. \| Sept. 11, 1979. \| Rehearing Denied Feb. 12, 1980.

Teacher sought relief on basis of contention that refusal to employ her as vice principal resulted from sex discrimination in violation of state statute. The Second Judicial District Court, Latah County, Roy E. Mosman, J., rendered judgment for defendants, and teacher appealed. The Supreme Court, Donaldson, C. J., held that: (1) fact that no woman had been hired for secondary administrative positions in school district did not make out prima facie case of sex discrimination under "disparate impact" theory; but (2) in such case in which teacher established, under "disparate treatment" theory, that refusal to employ her as vice principal for the asserted reasons that she lacked administrative ability and was unable to relate well with others was a prima facie case of sex discrimination, such prima facie case was not rebutted where defendants failed to present credible evidence suggesting that such reasons were in fact the real reasons; and (3) school district's rejection of eight male applicants was irrelevant to teacher's establishing of a prima facie discrimination claim.

Reversed and remanded.

Bistline, J., concurred specially and filed opinion.

Shepard, J., dissented and filed opinion in which Bakes, J., concurred.

West Headnotes (12)

[1] Civil Rights
Evidence

Though ultimate burden of persuasion on issue whether there has been discrimination in violation of state statute remains with complainant, the complainant may prove a prima facie unlawful discrimination case without proving an employer's intent to discriminate and thereby shift, to the employer, the burden of producing evidence of a lawful explanation for employer's treatment of complainant. (Per Donaldson, C. J., with one Justice concurring and one Justice concurring specially.) I.C. § 67-5909.

[2] Civil Rights
Evidence

Either "disparate treatment" theory or "disparate impact" theory may be applied to a particular set of facts for purpose of establishing a prima facie case of discrimination in violation of state statute. (Per Donaldson, C. J., with one Justice concurring and one Justice concurring specially.) I.C. § 67-5909.

[3] Civil Rights
Evidence

To establish prima facie case of illegal discrimination under "disparate impact" theory, plaintiff need only prove that an employer's policies and practices which are neutral on their face and intent nevertheless discriminate in effect against a particular group; thereafter employer must shoulder burden to show a business necessity for use of the policies or practices challenged. (Per Donaldson, C. J., with one Justice concurring and one Justice concurring specially.) I.C. § 67-5909.

[4] Civil Rights
Evidence

To establish prima facie case of discrimination

under "disparate treatment" theory, complainant must show that he belongs to a protected class, that he applied and was qualified for a job for which the employer was seeking applicants, and that despite his qualifications, he was rejected and that following his rejection, the position remained open and employer continued to seek applicants from persons of complainant's qualifications; at such point, burden shifts to employer to articulate some legitimate nondiscriminatory reasons for complainant's rejection. (Per Donaldson, C. J., with one Justice concurring and one Justice concurring specially.) I.C. § 67-5909.

[5] **Civil Rights**
Evidence

Proof of significant statistical disparity may be used to create a prima facie case of discrimination in violation of state statute. (Per Donaldson, C. J., with one Justice concurring and one Justice concurring specially.) I.C. § 67-5909.

[6] **Civil Rights**
Evidence

In proceeding in which teacher sought relief on basis of contention that refusal to employ her as vice principal resulted from sex discrimination in violation of state statute, fact that no woman had been hired for secondary administrative positions in school district did not make out a prima facie case of sex discrimination under "disparate impact" theory, in view of the small number of positions in the district and the small number of female applicants. (Per Donaldson, C. J., with on Justice concurring and one Justice concurring specially.) I.C. § 67-5909.

2 Cases that cite this headnote

[7] **Civil Rights**
Hiring

Subjective hiring procedures are not per se violative of Title VII of Civil Rights Act of 1964. (Per Donaldson, C. J., with one Justice concurring and one Justice concurring specially.) Civil Rights Act of 1964, § 703(a), 42 U.S.C.A. § 2000e-2(a).

5 Cases that cite this headnote

[8] **Civil Rights**
Evidence

If an employer utilizes subjective and unstructured standards in the hiring process, the employer, in addition to presenting legitimate nondiscriminatory reasons for an employment decision, must produce credible evidence to show that the reasons advanced were in fact the real reasons in order for employer to rebut a prima facie case of discrimination in violation of state statute; if employer does produce such credible evidence, burden of producing evidence shifts back to plaintiff to show that employer's reasons for rejecting plaintiff were in fact pretext. (Per Donaldson, C. J., with one Justice concurring and one Justice concurring specially.) I.C. § 67-5909.

[9] **Civil Rights**
Evidence

In action in which teacher established under "disparate treatment" theory, that refusal to employ her as vice principal for the asserted reasons that she lacked administrative ability and was unable to relate well with others was a prima facie case of sex discrimination in violation of state statute, such prima facie case was not rebutted where defendants failed to present credible evidence suggesting that such reasons were in fact the real reasons for rejecting teacher's application. (Per Donaldson, C. J., with one Justice concurring and one

Justice concurring specially.) I.C. § 67-5909.

[10] **Civil Rights**
Evidence

In proceeding in which teacher sought relief on basis of contention that refusal to employ her as vice principal resulted from sex discrimination in violation of state statute, school district's rejection of eight male applicants was irrelevant with respect to teacher's establishing of a prima facie discrimination claim. (Per Donaldson, C. J., with one Justice concurring and one Justice concurring specially.) I.C. § 67-5909.

[11] **Civil Rights**
Hiring

Where there is a claim of job discrimination by member of a minority covered by statutory provisions pertaining to discrimination, minority member is not deprived of his or her cause of action even though a person not a part of that minority is also rejected from the same job. (Per Donaldson, C. J., with one Justice concurring and one Justice concurring specially.) I.C. § 67-5909.

[12] **Civil Rights**
Evidence

Plaintiff, who alleges that he had been discriminated against by employer, need only show that plaintiff belongs to protected class, that he applied and was qualified for job for which employer was seeking applicants, that plaintiff was rejected despite his qualifications and that, following rejection, position remained open and employer continued to seek applicants from persons with plaintiff's qualifications; once plaintiff has made such showing, he has satisfied his burden of proof without having to show an intent to discriminate, and burden then shifts to employer to prove by credible evidence that he rejected plaintiff's application for legitimate nondiscriminatory reason. (Per Donaldson, C. J., with one Justice concurring and one Justice concurring specially.) I.C. § 67-5909.

Attorneys and Law Firms

***810** ****460** Allen V. Bowles, Moscow, for plaintiff-appellant.

Cope R. Gale, Moscow, for defendants-respondents.

Opinion

DONALDSON, Chief Justice.

Plaintiff-appellant, Donna Bowles (Bowles), brought a claim for relief in district court in which she alleged that the defendants-respondents, Marshal T. Keating, Superintendent, and the Moscow Public School District 281 (school district), refused her employment for a vice principal position as a result of sex discrimination in violation of I.C. s 67-5909. Following trial, the trial court found that the school district did not hire Bowles because of "her apparent lack of administrative ability and her failure to relate well to others," that Bowles was not the most qualified applicant for the job, and that the school district rejected all nine official applicants and instead hired a teacher from the Moscow Junior High School for the vice principal position. From these findings the court concluded that the school district's hiring process was not unreasonable, that the school district discriminated against all nine applicants but that such discrimination was not based on sex and that there were justifiable reasons for the school district to refuse to hire Bowles. Bowles then brought this appeal. We reverse and remand for a new trial.

The facts of this case are largely uncontested, and it is only the conclusions which flow from the facts which are in controversy. In the spring of 1973, there was an opening for the position of vice principal at Moscow High School. The school district gave notice of that opening to colleges in the Pacific Northwest, California and to the

Idaho State Department of Employment. Nine applicants, including Mrs. Bowles, filed applications in response to that announcement.

Bowles' educational qualifications for the position include a Bachelor's Degree in Business Education with a minor in English and a Master's Degree in School Administration. She also held an Idaho State Certificate for Administration. In terms of experience she had spent seven years as a teacher of business subjects, such as shorthand, typing and business law. She also had taught three years in a high school of 150 students in Pierce, Idaho, then in Benton City, Washington, in a school of 500 to 700 students and after that in a high school of approximately 150 students in Deary, Idaho. For two years in the winters, Bowles had taught adult education classes in shorthand and typing.

The evidence at trial disclosed that there were four administrative positions in Moscow's secondary school system in existence at the time Bowles filed her application for the vice principal position. At the time of trial no women held those positions. Bowles was the first woman to apply for one of the administrative positions; although, at the time of trial, one other woman had applied for a position. Defendant Keating did not recommend either Bowles or the subsequent applicant for a position.
The evidence also indicated that defendant Keating and a John Swartz, then the principal at Moscow High School, screened the nine applications submitted and interviewed four to six of the nine applicants, including Mrs. Bowles. Those interviews were unstructured in nature. Neither interviewer formulated any standardized written questions for the interviews. Nor did either take any formal notes of the interviews. Defendant Keating testified that he and Swartz utilized no objective tests or standards to evaluate those interviewed. In the main, they evaluated the applicants' responses subjectively.1 Upon completion of the interview process, Keating ***811 **461** and Swartz decided not to hire any of the nine applicants and instead offered the position to a man who had never filed an official application for the position and did not hold an Idaho Administrator's Certificate.2

As specifically relating to Bowles and the reasons for her rejection for the position, defendant Keating testified that in his opinion she lacked direct experience in the supervising of other teachers. He also expressed concern that because she had previously worked in smaller schools, she would be unfamiliar with computerized scheduling and grading. He also felt that the fact that Bowles' training was primarily in the business field might be a handicap in her supervising others in other academic areas. Finally, Keating, based on information from previous employers, believed that Bowles had difficulty in relating to others in the area of human relation skills. Swartz testified that he formulated his impressions of Bowles primarily from the interview. It was his opinion that she was weak in the area of working with discipline problems, as well as in the area of supervision of the instruction of teachers. A former supervisor of Bowles testified that while she thought Bowles was a good teacher and despite the fact that she had seen Bowles operate in a supervisory capacity only occasionally, she did not think Bowles would make a good administrator.

Based on the above evidence the trial court held for the defendant. On appeal, Bowles asserts that the trial court did not adhere to a correct order and allocation of proof at trial; that the evidence does not support the findings and conclusions of the trial court relating to the justifiable reasons for the rejection of her application: specifically, her lack of administrative ability and her inability to relate to others; and that the school district erroneously judged the applicants on the basis of subjective evaluations rather than using objective standards.

We point out initially that this action does not involve an asserted violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. s 2000e-2(a)). Neither does this action allege the violation of any of Bowles' constitutional rights under either the United States or Idaho Constitution. See Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

Idaho Code s 67-5909 provides:

> "Acts prohibited. It shall be a prohibited act to discriminate against a person because of, or on a basis of, race, color, religion, sex or national origin, in any of the following:
>
> (1) For an employer to fail or refuse to hire, to discharge, or to otherwise discriminate against an individual with respect to compensation or the terms, conditions or privileges of employment . . . ."

This provision clearly indicates the legislative intent to prohibit discrimination in employment practices in Idaho on the basis of sex. Idaho Trailer Coach Association v. Brown, 95 Idaho 910, 523 P.2d 42 (1974). In this respect I.C. s 67-5909 is a parallel state statute to Title VII of the Civil Rights Act of 1964. However, this Court has not had occasion to determine the necessary quantum of proof and applicable standards for adjudication of claims of statutorily proscribed discrimination on the basis of sex. ***812 **462** Many federal courts, on the other hand, have determined proof requirements and standards for adjudication under Title VII. Further, the state courts

which have had occasion to construe their discrimination statutes have done so on the basis of the quantum of proof and standards promulgated in the federal cases dealing with alleged Title VII sex discrimination violations. See Peper v. Princeton University Board of Trustees, 151 N.J.Super. 15, 376 A.2d 535 (1977); General Electric Corp. v. Commonwealth, 469 Pa. 292, 365 A.2d 649 (1976); Ellingson v. Spokane Mortgage Co., 19 Wash.App. 48, 573 P.2d 389 (1978). Four states have expressly adopted the federal quantum of proof and standards in sex discrimination cases. See State Fair Employment Practices v. Hohe, 53 Ill.App.3d 724, 11 Ill.Dec. 158, 368 N.E.2d 709 (1977); Wheelock College v. Massachusetts Commission against Discrimination, 371 Mass. 130, 355 N.E.2d 309 (1976); Danz v. Jones, 263 N.W.2d 395 (Minn.1978); Scarborough v. Arnold, 379 A.2d 790 (N.H.1977).

[1] Federal and state courts dealing with discrimination cases have recognized that "proof of unlawful discrimination rarely can be established by direct evidence and that an employer's seemingly arbitrary or pretextual explanation for a particular hiring judgment should not be permitted to justify conduct which is in fact unlawfully discriminatory." Wheelock College v. Massachusetts Commission against Discrimination, supra 355 N.E.2d at 314. Thus, while we acknowledge that the ultimate burden of persuasion on the issue of discrimination remains with the complainant, Board of Trustees of Keene State College v. Sweeney, 569 F.2d 169 (1st Cir. 1978), we accept the principle that a complainant may prove a prima facie unlawful discrimination case without proving an employer's intent to discriminate, thereby shifting the burden of producing evidence to the employer to give a lawful explanation for its treatment of the complainant. We therefore adhere to and are guided by the quantum of proof and standards promulgated in discrimination cases arising under Title VII.

[2] Under a Title VII analysis, once a plaintiff has carried the burden of producing evidence as to certain facts, certain presumptions arise in that plaintiff's favor. Without proving an employer's intent to discriminate, a discrimination plaintiff may make a claim for relief under either the "disparate treatment" theory of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), or the "disparate impact" theory of Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). See generally B. Schlei & P. Grossman, Employment Discrimination Law 1-12 (1976). Either theory may be applied to a particular set of facts. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). In this case Bowles has attempted to utilize both theories.

[3] To establish a prima facie case of illegal discrimination under the "disparate impact" theory, a plaintiff need only prove that an employer's policies and practices which are neutral on their face and intent, nevertheless discriminate in effect against a particular group. International Brotherhood of Teamsters v. United States, supra; Griggs v. Duke Power Co., supra. Thereafter, an employer must shoulder the burden to show a business necessity for the use of the policies or practices challenged. Griggs v. Duke Power Co., supra.

[4] To establish a prima facie case of discrimination under the "disparate treatment" theory, a plaintiff must show (1) that she belongs to a protected class, (2) that she applied and was qualified for a job for which the employer was seeking applicants, (3) that despite her qualifications, she was rejected, and (4) that following her rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.3 ***813 **463** McDonnell Douglas v. Green, supra; Peters v. Jefferson Chemical Co., 516 F.2d 447 (5th Cir. 1975). At this point, the burden shifts to the employer "to articulate some legitimate nondiscriminatory reason for the employee's rejection." McDonnell Douglas v. Green, supra 411 U.S. at 802, 93 S.Ct. at 1824.

[5] [6] In attempting to establish her "disparate impact" theory, Bowles relied upon employment statistics drawn from the Moscow School District. Proof of significant statistical disparity may be used to create a prima facie case of discrimination. See, e. g., Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), Cert. denied, 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237 (1971). See generally, B. Schlei & P. Grossman, Employment Discrimination Law 1147-96 (1976). Bowles asserts that since no woman has been hired for secondary administrative positions in the Moscow School District, such is a statistical imbalance within the group hired by the employer and is sufficient to create a prima facie case. We disagree. Such conclusion might appropriately be drawn if the statistical base relied on were larger, but here the small number of positions in the district (4), coupled with the small numbers of female applicants (2), precludes the inference that the lack of female administrators is attributable to discrimination, and not chance. See International Brotherhood of Teamsters v. United States, supra; Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 94 S.Ct. 1323, 39 L.Ed.2d 630 (1974); Robinson v. City of Dallas, 514 F.2d 1271 (5th Cir. 1975). See generally, Note, Employment Discrimination: Statistics and Preferences Under Title VII, 59 Va.L.Rev. 463 (1973). We note a lack of evidence in the record indicating the percentage of qualified secondary administrators who are women. As to

assumptions which may be drawn in the absence of such evidence, See International Brotherhood of Teamsters v. United States, supra; Mayor of Philadelphia v. Educational Equality League, supra; Robinson v. City of Dallas, supra; Hester v. Southern Railway Co., 497 F.2d 1374 (5th Cir. 1974). See generally, Note Title VII and Employment Discrimination in "Upper Level" Jobs, 73 Colum.L.Rev. 1614 (1973); Note, Employment Discrimination: Statistics and Preferences Under Title VII, 59 Va.L.Rev. 463 (1973). Here, we hold that Bowles did not make a prima facie case based upon the "disparate impact" theory.

Bowles also asserts that she established a prima facie case of discrimination under the "disparate treatment" theory. McDonnell Douglas v. Green, supra. We agree that Bowles did make out a prima facie case under those standards. This is not dispositive of the case, however. When a plaintiff establishes such a prima facie case, the burden of producing evidence then shifts to the employer to articulate some legitimate nondiscriminatory reason for the applicant's rejection. As the United States Supreme Court recently stated in Furnco Const. Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 2949-2950, 57 L.Ed.2d 957 (1978):

> "A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.
>
> "When the prima facie case is understood in light of the opinion in McDonnell Douglas, it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race. . . . To dispel the adverse inference from a prima facie showing under McDonnell Douglas, the employer need only 'articulate some legitimate nondiscriminatory reason for the employee's rejection.' "

***814 **464** Hence in the instant case the burden of producing evidence which shifted to the school district was that of proving that the decision not to hire Bowles was based on legitimate nondiscriminatory considerations. It is the nature of the burden which shifts to the defendant in this case and the proof required once the burden does shift which causes us to reverse the decision of the district court and remand this case for a new trial.

[7] In the abstract, shifting the burden of producing evidence to the employer may be no burden at all where, as here, the employer utilizes subjective and unstructured standards to make an employment decision. The record before us clearly indicates that the school district based its decision not to hire Bowles on subjective and unstructured standards. Bowles asserts that such standards can be easily manipulated to disguise discrimination. We certainly do not dispute the validity of this assertion. But it is also true that decisions of hiring or promotion in upper level jobs may of necessity involve assessments of such abstractions and intangibles, as leadership, personality, ability to relate to others and supervisory ability, which are difficult, if not impossible, of realistic measurement by objective technique alone. See Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir. 1975), Vacated and remanded on another issue, 423 U.S. 809, 96 S.Ct. 19, 46 L.Ed.2d 29 (1975), Opinion on remand, 526 F.2d 722 (1975); Note, Title VII and Employment Discrimination in "Upper Level" Jobs, 73 Colum.L.Rev. 1613 (1973). We note that subjective hiring procedures are not per se violative of Title VII. Rogers v. International Paper Co., supra; Hester v. Southern Railway Co., supra; see generally, B. Schlei & P. Grossman, Employment Discrimination Law 166-81 (1976).

[8] But we are of the opinion that where, as in this case, an employer utilizes subjective and unstructured standards in the hiring process, that employer, in addition to presenting legitimate nondiscriminatory reasons for an employment decision, must produce credible evidence to show that the reasons advanced were in fact the real reasons. See Garrett v. Mobil Oil Corp., 531 F.2d 892, 895-896 (8th Cir. 1976); Rich v. Martin Marietta Corp., 522 F.2d 333, 348 (10th Cir. 1975); Peters v. Jefferson Chem. Co., supra; Holthaus v. Compton & Sons, Inc., 514 F.2d 651, 653-654 (8th Cir. 1975). If the employer does not produce such credible evidence, he has failed to rebut the plaintiff's prima facie case. The Massachusetts Supreme Court stated it this way:

> "(I)f the reason given by the employer is the real reason for its action and it is a nondiscriminatory one . . . the employer has fulfilled its obligation of stating a reason and producing support for the stated reason, thus rebutting the prima facie case."

Wheelock College v. Massachusetts Commission against Discrimination, supra, 355 N.E.2d at 315. If the employer does produce such credible evidence, then the burden of producing evidence shifts back to the plaintiff to show that the employer's reasons for rejecting the plaintiff were in fact pretext. McDonnell Douglas Corp. v. Green, supra.

[9] Our review of the record indicates that while the school district presented their reasons for rejecting Bowles' application lack of administrative ability and inability to relate well with others they failed to present credible evidence to suggest that those reasons were anything more than convenient reasons.4

The only evidence in the record with respect to Bowles' inability to relate well to others is the testimony of defendant Keating. He offered testimony that based on information which he had from other employers, he believed that "she might have difficulty in the area of human relation skills." While there is other testimony in the record concerning Bowles' qualifications ***815 **465** or lack of qualifications, there is no other testimony bearing specifically on her ability to relate well to other people.

As it relates to Bowles' administrative abilities, the record indicates that she had a more significant administrative background than the person who was hired. The trial judge himself so stated at trial. In light of this, the finding of the fact that Bowles was not the most qualified applicant for the job becomes a meaningless finding.

[10] We turn now to a discussion of the trial court's conclusion of law that since all nine applicants (eight men and one woman) were discriminated against, Bowles could not seek relief based on a claim of sex discrimination. The problem is that this logic effectively forces the plaintiff to show initially, contrary to the holding of McDonnell Douglas and Furnco, that the employer intended to discriminate against her on the basis of sex. The trial judge erroneously considered such a threshold showing to be essential in order for Bowles to make out a claim for relief. At trial he stated:

> "(I)t seems to me that there must be something that shows discrimination directed toward your client because she's a female. And I don't find that in the record. There's no question she was discriminated against but it seems to me she was an outsider. And I don't think you've shown anything just because she was a woman."

The fact of the matter is that because Bowles claims to have been discriminated against on the basis of sex, under I.C. s 67-5909, she has a claim for relief. The school district's rejection of the other eight applicants, all of whom were male, is irrelevant to her establishing a prima facie discrimination claim; although, it may be relevant to the school district's attempt to rebut Bowles' prima facie case.

[11] [12] Where there is a claim of job discrimination by a member of the minority covered by chapter 59 of the Idaho Code, that minority member is not deprived of his or her cause of action even though a person not a part of that minority is also rejected from the same job. Quite to the contrary, I.C. s 67-5909 opens the doors of this state's courts to a plaintiff who alleges that an employer discriminated against her/him on the basis of race, color, religion, sex or national origin with a minimum showing on his or her part. Under McDonnell Douglas, such a plaintiff need Only show that: (1) that person belongs to a protected class, (2) that person applied and was qualified for a job for which the employer was seeking applicants, (3) that despite that person's qualifications, she/he was rejected, (4) and lastly, that following her/his rejection, the position remained open and the employer continued to seek applicants from persons of her/his qualifications. Once a discrimination plaintiff has made this showing, without any showing of an employer's intent to discriminate, she/he has satisfied her/his burden of proof. At that point the burden shifts to the defendant-employer to prove by credible evidence that it rejected the plaintiff's application for legitimate nondiscriminatory reasons. If the employer's reasons are legitimate nondiscriminatory ones and if they are the real reasons for the employer's actions, the employer has fulfilled its obligation of stating reasons and producing support for those reasons, thus rebutting a prima facie discrimination case.

The proper focus in this case is on the defendants' ability to rebut Mrs. Bowles' prima facie discrimination case, not on Mrs. Bowles' ability to produce evidence of the school district's intent to discriminate on the basis of sex. If the defendants successfully rebut her case, the practical effect of such a rebuttal would be that there was no discrimination on the basis of sex as a matter of law. Conversely, if the defendants fail in their burden, the effect would be to conclude that they discriminated against the plaintiff on the basis of sex in violation of I.C. s 67-5909 as a matter of law.

As is evident from the foregoing discussion of the record and of the law to be applied, this action was tried with a certain amount of confusion, as to the standards to be used to guide the litigation, the burden required of the plaintiff to establish a prima ***816 **466** facie case and the burden upon the defendants to rebut that case. Given the confusion at trial and the resulting absence of a record which would indicate whether the trial judge found for the defendants because Bowles could not prove the school district intended to discriminate against her on the basis of sex and whether the school district did in fact rebut Bowles' prima facie showing, a new trial is in order.

We have taken the time to set out the nature of the proof required and the standards to be utilized in determining the validity of a discrimination claim under I.C. s 67-5909 in this case because it represents one of the first significant state job discrimination cases to reach Idaho courts. We have no doubt that many will follow. We have no desire to deal with these future cases in an ad hoc manner. Nor will this Court be complacent with allowing litigants in such cases to build a record for appeal in the same ad hoc manner.

This case is reversed and remanded for a new trial in accordance with this opinion. We award costs pursuant to I.A.R. 40(a).

McFADDEN, J., concurs.

BISTLINE, Justice, specially concurring.

I agree that we should utilize federal case law under Title VII to fashion the standards which, absent further governing legislation, will apply to actions brought in this state under I.C. s 67-5909. This serves to relieve our district courts of the burden of forging new law in this delicate area, and also appears to further the legislative intention as expressed in I.C. s 67-5901:

> "The general purposes of this act are: (1) To provide for execution with the state of the policies embodied in the federal Civil Rights Act of 1965 (sic) and to make uniform the laws of those states which enact this act. . . ."

I also agree that we must remand this case for a new trial, for I am unable to completely agree with the analysis contained in the dissenting opinion. That analysis fails to reduce the procedure followed here by the trial court to the category of "harmless error." As noted by the plurality, it is evident from the trial transcript and briefs that much confusion attended the trial not an unexpected turn of events, given the lack of guidelines for the trial court to follow. If Mrs. Bowles had no opportunity to establish that the defendant employer's articulated reasons for refusing to hire her were in fact pretextual, as appears to be the case, this alone presents sufficient reason to justify reversing for a second trial free of that infirmity. E.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Moreover, there is reason to hold that the trial court's findings of fact and conclusions of law are sufficiently confusing to warrant reversal for clarification. A trial court's findings ought to be such as to assist the appellate court in reaching a clear understanding of the basis for the decision. *See* Perry Plumbing Co. v. Schuler, 96 Idaho 494, 531 P.2d 584 (1975); Dawson v. Eldredge, 84 Idaho 331, 372 P.2d 414 (1962). The judge who tried this cause has since returned to private practice. It is appropriate in reversing, therefore, to remand the cause for an entirely new trial. *See* Walter v. Potlatch Forests, Inc., 94 Idaho 738, 497 P.2d 1039 (1972).

If the plurality advocates adopting a standard of proof to require the employer to prove his "real" reason to the exclusion of all other reasons, as the dissent maintains, however, I must disagree with that standard. The plurality states that the "employer, in addition to presenting legitimate nondiscriminatory reasons for an employment decision, must produce credible evidence to show that the reasons advanced were in fact the real reasons." This statement is followed by a reference to five cases.

As the dissent points out, there are at least two ways to read that standard set forth by the plurality. The first way is to hold that the employer must do more than merely state a reason for his decision, where such reason has no support in the evidence. This apparently is the standard the dissent would adopt. A second possible ***817 **467** reading is to require that the employer prove his "real" reasons to the exclusion of all other possible reasons, including those of a discriminatory nature. After a close examination of the cases cited by the plurality, I cannot agree that this more stringent standard was utilized in those cases or that it should be adopted here. I also do not believe that this was the standard that the plurality intended to adopt.

In the first case cited by the plurality, Garrett v. Mobil Oil Corp., 531 F.2d 892 (8th Cir. 1976), the court merely held that there was substantial evidence to support the judge's findings that plaintiff was discharged for the reasons stated by defendant and that those reasons were not pretext. That court stated that once a prima facie case is made out by the plaintiff, the "burden then shifts to defendant to show a valid reason for the action, and plaintiff is then afforded an opportunity to show that defendant's asserted reason is a mere pretext." Id. at 895. This statement that defendant must "show a valid reason" can in no way be read to require him to prove his "real" reason to the exclusion of all others.

The court in Rich v. Martin Marietta Corp., 522 F.2d 333, 348 (10th Cir. 1975) , stated that "(d)efendant may, of course, rebut this prima facie showing by producing evidence of objective business reasons or necessity for its failure to promote the plaintiffs. Plaintiffs, in turn, are free to show that this was pretextual." The only other relevant

statement made by the court was "(a)s to the salaried positions and the use of the totem pole, it would appear that the defendant would have the burden of establishing the fundamental fairness of this approach since it is largely subjective." Id. Again, these two statements do not place on the employer the burden of proving the real reason to the exclusion of all others.

In Peters v. Jefferson Chemical Co., 516 F.2d 447 (5th Cir. 1975), the court stated that " '(o)nce the plaintiff has made out his prima facie case we look to the defendant for an explanation since he is in a position to know whether he failed to hire a person for reasons which would not exonerate him.' " Id. at 450, quoting Hodgson v. First Federal Savings & Loan Association, 455 F.2d 818, 822 (5th Cir. 1972). The court stated that defendant had established legitimate non-discriminatory reasons, that the plaintiff had not been transferred because she had a history of back problems and the job would have required heavy weight lifting. The court's statement that it would "look to the defendant for an explanation" does not amount to a shift in the burden of proof, as opposed to the burden of going forward.

The defendant in Holthaus v. Compton & Sons, Inc., 514 F.2d 651 (8th Cir. 1975), failed to establish a "legitimate, nondiscriminatory reason for the employee's rejection," but it was not because the court required him to prove his real reason. Rather he failed to show that the reason advanced was at all credible. Defendant's only evidence consisted of self-serving statements that plaintiff's work was piling up and that other employees couldn't take care of it. Furthermore, it was shown that in the past defendant had used temporary help to fill in for absentees, but defendant refused to do so in this case.

The confusion surrounding the burden of proof here was perhaps best illustrated in the final case cited in the plurality opinion, Wheelock College v. Massachusetts Commission Against Discrimination, 371 Mass. 130, 355 N.E.2d 309 (1976). That court stated that the employer's burden in articulating "some legitimate, nondiscriminatory reason" requires the employer to produce not only evidence of the reason for its action but also underlying facts in support of that reason. However, that court further stated that the employee then has the burden of persuasion on the issue of whether the articulated reason was in fact the real reason for the employer's actions, or merely pretextual. Later in the opinion the court also stated that "an employer must not only give a lawful reason or reasons for its employment decision but also must produce credible evidence to show that the reason or ***818 **468** reasons advanced were the real reasons." Id. at 138, 355 N.E.2d at 314. The citations after this statement showed that the court was only putting the burden of going forward on the defendant, however, not the burden of proof. The only other statement made by the court on this issue was as follows:

> "(I)f the employee has proved a prima facie case of sex discrimination and the employer gives an explanation for a hiring decision which has no reasonable support in the evidence or is wholly disbelieved (and hence is transparently pretextual), the employee should prevail. On the other hand, if the reason given by the employer is the real reason for its action and it is a nondiscriminatory one, even if the commission thinks the employer's action was arbitrary or unwise, the employer has fulfilled its obligation of stating a reason and producing support for the stated reason, thus rebutting the prima facie case." Id. at 138-39, 355 N.E.2d at 315.

As I read this case, the employer must produce evidence to show that his stated reasons are not transparently pretextual, I.e., he must set forth evidence which would reasonably justify the conclusion that the stated reasons were not merely convenient rationale. This is only a burden of going forward with sufficient evidence to rebut the prima facie case, for the ultimate burden of proof on the issue of discrimination remains with plaintiff. At no time does the burden of proof itself shift to the employer.

There appear to be two reasons why some courts, apparently aloof from the fact that the Ultimate burden of proof remains at all times on the plaintiff, See King v. Yellow Freight System, Inc., 523 F.2d 879 (8th Cir. 1975); Naraine v. Western Electric Co., 507 F.2d 590 (8th Cir. 1974), seemingly place the burden of proof on the employer at this second step. One reason is simply through a linguistic error and a misunderstanding of the distinction between going forward with the evidence and having the burden of proof. See, e.g., Board of Trustees v. Sweeney, 439 U.S. 24, 99 S.Ct. 295, 296-98, 58 L.Ed.2d 216 (1978) (Stevens, J., dissenting). The second reason is a feeling that only the employer knows the real reasons for his decision, and, if it is a subjective decision, it is very difficult for plaintiff to prove that it was a discriminatory reason; thus the employer should have the burden of proving that his decision was nondiscriminatory once a prima facie case is made out. This assumes, however, as the plurality here states, that "the practical effect (of defendants rebutting plaintiff's prima facie case) . . . would be that there was no discrimination on the basis of sex as a matter of law." I must disagree with this assumption that for all practical purposes the third step, where plaintiff can show pretext, is superfluous. There are ways that pretext can be shown. Plaintiff can show pretext by showing that the records relied on in support of the advanced reason "were fraudulent, inaccurate or

otherwise unreliable . . . if they were intended or known to be so . . . ." Taylor v. Safeway Stores, Inc., 365 F. Supp. 468 (D.Col.1973), aff'd in part, rev'd in part on other grounds, 524 F.2d 263 (10th Cir. 1975). Plaintiff could also show sufficient pretext to take the issue to the trier of fact by showing that the reasons advanced had no bearing on plaintiff's ability to perform on the job or by showing that the person actually hired was even less qualified in those areas relied on by the employer.

The plurality opinion acknowledges that the ultimate burden of proof remains with the plaintiff. It also states that a prima facie case shifts "the burden Of producing evidence to the employer to give a Lawful explanation for its treatment of complainant" (emphasis added). A better reading of the plurality opinion leads to the conclusion that the standard adopted is one of producing enough evidence to show that the advanced reasons were not purely pretextual, for the plurality held that defendants had not met their burden because "(t) hey failed to present credible evidence to suggest that those reasons were anything more than convenient reasons." The plurality did not hold that defendants had not met their burden of proving that the reasons advanced were in fact the real reasons, but only that they had in effect merely stated reasons ***819 **469** without enough support in the evidence to rebut plaintiff's prima facie case. The statement that defendant "must produce credible evidence to show that the reasons advanced were in fact the real reasons," a statement taken from Wheelock College, supra, does not to my mind place the burden on defendant of proving that the reasons advanced were in fact the real reasons. It merely requires him to produce enough evidence to justify the conclusion that his reasons reasonably could have been the real reasons. That was the standard adopted by the court in Wheelock College, and I believe that is the standard which should be applied and that it is the standard which the plurality intended to adopt.

Although subjectiveness will always remain a part of the hiring process for many types of jobs, "(a)bsolute discretion over employment decisions where subjective race prejudice may control (perhaps even without the executive's knowledge) is no longer consistent with our law." Abrams v. Johnson, 534 F.2d 1226, 1231 (6th Cir. 1976). Employers would be better off, both legally and probably job-wise, if they developed reasonably objective hiring procedures and records that they could then present to the court on being charged with job discrimination.

Even if I am incorrect in this reading of the plurality opinion, moreover, it appears from reading both opinions that a majority of this Court would agree with me that the quantum and standard of proof is as follows: (1) plaintiff carries the initial burden of making out a prima facie case from which it can be inferred, "if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.' " Furno Construction Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978), quoting International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977); (2) defendant then must rebut that prima facie showing by producing enough evidence to show that his stated reasons are in fact credible, I.e., that his decision could reasonably have been based on the reasons set forth; and (3) plaintiff then can show that in fact the reasons stated are pretextual.

SHEPARD, Justice, dissenting.

I would affirm. In my view, the trial court's findings of fact of no illegal discrimination are Not clearly erroneous under either state or federal standards. The federal framework for the adjudication of claims of sex discrimination is by no means settled. It is apparent that the majority is intent upon applying federal Title VII analysis to the case at bar and, in my opinion, parts of the analysis contained in the majority are either unclear or erroneous statements of federal law.

To prove a violation of Title VII of the Civil Rights Act of 1964, the plaintiff may proceed under either the "disparate treatment" theory of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), or the "disparate impact" theory of Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). Claims of disparate treatment are distinguishable from claims of disparate impact:

> "The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate impact theory." Int'l Brd. of Teamsters v. United States, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977).

I am in accord with the majority's analysis of plaintiff's claim under the disparate impact theory.

"Disparate treatment" is the most readily understood type of discrimination.

> "The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory

> motive is critical, although it can in some situations be inferred from the mere fact of differences ***820 **470** in treatment." Int'l Brd. of Teamsters v. United States, supra, at 335 n. 15, 97 S.Ct. at 1854 n. 15.

Thus, contrary to the majority, it Is necessary for Donna Bowles to show that the defendants intended to discriminate against her on the basis of sex. See also Furnco Constr. Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978); Sweeney v. Bd. of Trustees of Keene State College, 569 F.2d 169 (1st Cir. 1978), Rev'd on other grounds, 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978); Presseisen v. Swarthmore College, 442 F.Supp. 593 (E.D.Pa. 1977). In recognition of the difficulty of proving intent, however, the United States Supreme Court has established a method by which a plaintiff may generate an inference of discrimination upon the showing of certain facts. McDonnell Douglas Corp. v. Green, Supra. The four elements needed for a plaintiff to make out a prima facie case are as set forth in the majority opinion. Once the four McDonnell Douglas factors are met, an inference of discriminatory motive is raised. Chavez v. Tempe Union High School Dist. No. 213, 565 F.2d 1087 (9th Cir. 1977).

If the plaintiff carries the initial burden and establishes a prima facie case, the "burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas Corp. v. Green, supra 411 U.S. at 802, 93 S.Ct. at 1824. See also Furnco Constr. Corp. v. Waters, supra. The burden which shifts is not, as the majority suggests, the burden of persuasion but, rather, the burden of going forward with the evidence. The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff, who must convince the court by a preponderance of the evidence that she has been the victim of discrimination. Bd. of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978) (Stevens, J., dissenting); Sweeney v. Bd. of Trustees of Keene State College, 569 F.2d 169 (1st Cir. 1978); Croker v. Boeing Co., 437 F.Supp. 1138 (E.D.Pa. 1977). If the employer articulates a reason for rejection sufficient to rebut the plaintiff's prima facie case, the trial enters a third phase not treated in the majority opinion. At this point, the plaintiff is to be "afforded a fair opportunity to show that petitioner's (the employer's) stated reason for respondent's (the employee's) rejection was in fact pretext." McDonnell Douglas Corp. v. Green, supra 411 U.S. at 804, 93 S.Ct. at 1825. See also Furnco Constr. Corp. v. Waters, supra.

The majority correctly concludes that Mrs. Bowles established a prima facie case of discrimination under the McDonnell Douglas disparate treatment criteria. I agree that the proper focus in this case is thus upon the defendant's ability to rebut this prima facie case. I do not agree, however, that the defendants failed to rebut the prima facie case.

In reaching its conclusion that the defendants failed to rebut plaintiff's prima facie case, the majority appears to be adopting a new standard of proof to apply to such factual situations. Under federal pattern and practice, an employer need only "articulate some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas Corp. v. Green, supra at 802, 93 S.Ct. at 1824. The majority is now placing upon the Idaho employer who uses subjective hiring practices the additional burden of producing "credible evidence to show that the reasons advanced were in fact the Real reasons." (Emphasis added.) We are not told what "real" reasons are, and how one goes about distinguishing them from some other kind. There are at least two possible ways to read this new standard. The majority may wish to emphasis that the employer must do something more than merely "state" his reasons. Under Furnco and McDonnell Douglas "the employer's burden is satisfied if he simply 'Explains what he has done' or'Produc(es) evidence of legitimate nondiscriminatory reasons.' " Bd. of Trustees of Keene State College v. Sweeney, supra. It has never been the law that the employer may rebut a prima facie case by merely stating a reason which has no support in the evidence.

***821 **471** Another, and more logical, way to read the majority's new standard is as an imposition upon the employer to prove his "real" reason to the exclusion of all other reasons including those of a discriminatory nature. If this be the case, a defendant employer in Idaho will be saddled with a burden more onerous than he would bear in federal court. In Bd. of Trustees of Keene State College v. Sweeney, supra, the Court dealt with that very issue and reversed a Court of Appeals decision which required the defendant employer to prove an Absence of discriminatory motive because that party had greater access to such evidence. The Court noted that in Furnco and McDonnell Douglas it was stated that an employer may dispel the adverse inference from a prima facie case by simply articulating some legitimate, nondiscriminatory reason for the employee's rejection. The Court then declared that "there is a significant distinction between merely 'articulat(ing) some legitimate, nondiscriminatory reason,' and 'prov(ing) absence of discriminatory motive'. . . . (T)he former will suffice to meet the employee's prima facie case of discrimination." 99 S.Ct. at 295. The Court also noted that placing the burden of proving the absence of a discriminatory motive on the employer,

> "would make entirely superfluous the third step in the Furnco McDonnell Douglas analysis, since it would place on the employer at the second stage the burden of showing that the reason for rejection was not a pretext, rather than requiring such proof from the employee as part of the third step." 99 S.Ct. at 295 n. 1.

If this Court wishes, as it states, to follow federal law, then the proper question before us is simply whether the defendants articulated or established that there was a legitimate, nondiscriminatory reason for not hiring Mrs. Bowles. There is no justification or basis in the case law for imposing upon the defendants the obligation to prove that this was the "real" reason to the exclusion of others. To impose that additional proof burden on defendants, the majority ostensibly uses the fact that the school district used subjective hiring procedures. It must be noted in this regard that the employer in McDonnell Douglas also used a subjective criterion for refusing to hire the plaintiff therein. Although the Court of Appeals had said that the subjective reason would carry little weight in rebutting charges of discrimination, the Supreme Court said that it would suffice to meet the prima facie case. McDonnell Douglas Corp. v. Green, supra, 411 U.S. at 804, 93 S.Ct. 1817. At this point, then, the sole question is whether the defendants articulated or established a legitimate, nondiscriminatory reason for not hiring Mrs. Bowles.

The district court, based upon the evidence adduced at trial, expressly found that plaintiff was not hired "because of her apparent lack of administrative ability and her failure to relate well to others." He, therefore, concluded as a matter of law that "there were justifiable reasons for the defendant school district not to hire the plaintiff." This Court can overturn the judge's decision only by ruling that it was "clearly erroneous." I.R.C.P. 52(a). This same standard is applicable to judge-tried discrimination cases in federal court. E. g., Garrett v. Mobil Oil Corp., 531 F.2d 892 (8th Cir. 1976); Causey v. Ford Motor Co., 516 F.2d 416 (5th Cir. 1975).

On appeal it is axiomatic that the record, the evidence, and the inferences arising therefrom are to be viewed most favorably to the respondent and in support of the findings of the trial court. Matter of Estate of Webber, 97 Idaho 703, 551 P.2d 1339 (1976). As to appellant's experience in administration, the testimony indicates that aside from formal education she had worked approximately seven years as a teacher of business subjects such as shorthand, typing, and business law in three different high schools. In two of them, she taught under the supervision of her husband, who was the high school principal. Two of those schools numbered approximately 150 students as contrasted with approximately 600 in Moscow high school. For two years in the winter season she taught adult education classes in shorthand ***822 **472** and typing under the supervision of one Andruiza. She had made application for a teaching position at Moscow high school and later for a position in administration at the University of Idaho and was not hired for either position. During 1973 and 1974, she made application for positions as Moscow junior high school vice-principal, Moscow high school vice-principal, and Moscow high school principal. She was not hired for any of these positions. Since 1973, she has worked as legal secretary for her husband.

As stated in the majority opinion, appellant was interviewed by defendant Keating and Swartz, who was then the principal at Moscow high school. Both testified that they felt Bowles lacked direct experience in the supervision over the teachers; that her experience in smaller schools would handicap her in dealing administratively with computerized scheduling and grading in a large school such as Moscow; that she had little experience in working with discipline problems; and when they checked with former supervisors of Bowles, it was reported that she had difficulty in relating to others in the area of human relation skills. That testimony was supported by the testimony of one Andruiza, a former supervisor of Bowles.

It is true, as asserted by the majority opinion, that subjective and unstructured standards were utilized in evaluating appellant's application. However, it is also true that decisions of hiring or promotion in upper level jobs may necessarily involve such abstractions and intangibles as leadership, personality, ability to relate to others, and supervisory ability, which are difficult, if not impossible, to realistically measure by objective techniques alone. See Rogers v. Int'l Paper Co., 510 F.2d 1340 (8th Cir. 1975), vacated and remanded on another issue, 423 U.S. 809, 96 S.Ct. 19, 46 L.Ed.2d 29 (1975), opinion on remand, 526 F.2d 722 (8th Cir. 1975), Note, Title VII and Employment Discrimination in "Upper Level" Jobs, 73 Colum.L.Rev. 1614 (1973). Subjective hiring procedures are not Per se violative of Title VII, Rogers v. Int'l Paper Co., supra; Hester v. Southern Railroad Co., 497 F.2d 1374 (5th Cir. 1974).

In my judgment, the record here supports the finding of the trial court "that the plaintiff was not hired by the defendant, Moscow School District, as the high school vice-principal because of her apparent lack of administrative ability and her failure to relate well to others." Thus, evidence Was adduced to show a legitimate nondiscriminatory reason. Thereafter, appellant had full opportunity to produce evidence to show that defendant's refusal to hire was, in fact, sexually premised. This she did not do. I would hold that since the trial court's ruling

was not clearly erroneous, we are bound to accept it. I.R.C.P. 52(a).

In my judgment, the majority opinion ignores the record which clearly supports the ruling of the trial court and appears to be influenced by two additional factors. The first appears to be that the trial court did not expressly recognize that appellant had established a prima facie case of sex discrimination. If the trial court had dismissed plaintiff's case at the end of her case in chief or ended his analysis with the simple conclusion that she had not met her burden of establishing a prima facie case, I, too, would vote for a reversal. However, the purportedly erroneous statement of the trial judge contained in the majority opinion occurred at the conclusion of the entire trial, and since the trial court at that time had heard evidence of legitimate reasons for the refusal to hire, I would hold that he was correct in suggesting at that point the necessity of tendering evidence showing that the hiring decision was sexually premised. Appellant was not halted at the "threshold." Federal courts have held that any error in classifying plaintiff's proof as insufficient to create a prima facie case is harmless error. See, e. g., Smith v. Liberty Mut. Ins. Co., 569 F.2d 325 (5th Cir. 1978); Peters v. Jefferson Chem. Co., 516 F.2d 447 (5th Cir. 1975).

The second factor which I view as influencing the majority opinion is the trial court's conclusion "that all nine of the applicants for the job of high school vice-principal were discriminated against, but said ***823 **473** discrimination was not based on sex, and said discrimination was not illegal." That conclusion is probably substantiated in the record as a desire on behalf of the defendants-respondents to hire a current employee of the school district, or an "insider." The majority opinion Finds that appellant "had a more significant administrative background than the person who was hired." I would disagree with that Finding of the majority. I would view the record otherwise and only note that the trial court made no such finding. The record sustains, and I would uphold, the finding of the trial court that the appellant was not the most qualified of the nine applicants for the job regardless of what her qualifications might be when compared to those of the "insider." The conclusion to be drawn from this is that a male who was the most qualified of the applicants, as well as Mrs. Bowles, appear to have been discriminated against in favor of an "insider" who also happened to be a male. While such may be offensive to our abstract notions of fair play, I would hold that the trial judge was correct in ruling that it was not an Illegal Form of discrimination. Discrimination is not unlawful unless the form of discrimination is constitutionally or statutorily forbidden. B. Schlei & P. Grossman, Employment Discrimination Law 15 (1976). A practice of "cronyism" or "insider" hiring may, in some instances, be facially neutral, but also have a discriminatory impact. See Local 53 of Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); Lee v. City of Richmond, 456 F.Supp. 756 (E.D.Va. 1978). However, I find no such evidence of discriminatory impact in the case at bar.

I would affirm the decision of the lower court.

BAKES, J., concurs.

Parallel Citations

606 P.2d 458

Footnotes

1 At trial neither interviewer could specifically recall specific questions asked at the interviews. Swartz testified that all he could specifically remember about Bowles' interview was that she did not go into enough detail in response to his questions whatever they were.

2 At trial, the trial judge commented to defendant Keating that it appeared to him that Keating had intended to hire the uncertified individual all along. The trial judge based this observation partially on the fact that Keating had signed a statement after reviewing the nine official applications to the effect that no certified person was available for the position even though Mrs. Bowles was certified. Keating denied any such intention. He then noted this individual's qualifications which in his, Keating's mind, better qualified him as an administrator than Mrs. Bowles:

> "He had successfully completed training as a jet flight pilot with the United States Air Force and I felt that that experience had given him a good deal of leadership training. A good deal of experience in supervision of others. Good deal of training in administrative responsibilities that would be very similar to a position in school administration. I personally felt that that was a strong plus factor in his background for the position we were considering for."

3 While there has been some suggestion that the order, nature, and burden of proof prescribed by the United States Supreme Court in McDonnell Douglas Corp. v. Green, supra, a racial discrimination case under Title VII, is inapplicable to sex discrimination cases,

the United States Supreme Court in Edwin L. Wiegand Co. v. Jurinko, 414 U.S. 970, 94 S.Ct. 293, 38 L.Ed.2d 214 (1973), has indicated that the proof requirements in McDonnell Douglas are applicable to sex discrimination cases. See also Jacobs v. Martin Sweets Co., Inc., 550 F.2d 364 (6th Cir. 1977).

4 Given our conclusion in this regard, we do not reach the question of whether Bowles presented evidence showing that the School District's reasons for rejecting her were mere pretext.

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118 S.Ct. 2257
Supreme Court of the United States

BURLINGTON INDUSTRIES, INC.,
Petitioner,
v.
Kimberly B. ELLERTH.

No. 97-569. | Argued April 22, 1998. | Decided June 26, 1998.

Employee who had suffered no adverse job consequences as result of alleged sexual harassment by supervisor brought suit against former employer under Title VII alleging that sexual harassment forced her constructive discharge. The United States District Court for the Northern District of Illinois, Castillo, J., 912 F.Supp. 1101, entered summary judgment in favor of employer. The Seventh Circuit Court of Appeals, 123 F.3d 490, reversed. Employer petitioned for certiorari. The Supreme Court, Justice Kennedy, held that: (1) employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate or successively higher authority over employee; (2) in those cases in which employee has suffered no tangible job consequences as result of supervisor's actions, employer may raise an affirmative defense to liability or damages; and (3) affirmative defense requires employer to show that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and that employee unreasonably failed to take advantage of any preventive or corrective opportunities provided or to avoid harm otherwise.

Affirmed.

Justice Ginsburg filed opinion concurring in judgment.

Justice Thomas filed dissenting opinion, in which Justice Scalia joined.

West Headnotes (13)

[1] **Civil Rights**
Quid pro quo
Civil Rights
Hostile environment; severity, pervasiveness, and frequency
Civil Rights
Vicarious liability; respondeat superior

Terms quid pro quo and hostile work environment are not controlling for purposes of determining employer liability for harassment by supervisor; however, terms are helpful in making rough demarcation between Title VII cases in which sexual harassment threats are carried out and where they are not or are absent altogether, and thus terms are relevant when there is threshold question whether employee can prove discrimination in violation of Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
596 Cases that cite this headnote

[2] **Civil Rights**
Practices prohibited or required in general; elements
Civil Rights
Quid pro quo
Civil Rights
Hostile environment; severity, pervasiveness, and frequency

When employee proves that tangible employment action resulted from refusal to submit to supervisor's sexual demands, he or she establishes that employment decision itself constitutes change in terms and conditions of employment that is actionable under Title VII; however, for any sexual harassment preceding employment decision to be actionable, conduct must be severe or pervasive. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
447 Cases that cite this headnote

[3] **Civil Rights**
Vicarious liability; respondeat superior

Federal law, based on general common law principles of agency, governs employer's vicarious liability under Title VII for sexual harassment by supervisor, although common law principles may not be wholly transferable to Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
83 Cases that cite this headnote

[4] **Labor and Employment**
⇐Nature of liability in general
Labor and Employment
⇐Scope of Employment

Employer may be liable for both negligent and intentional torts committed by employee within scope of his or her employment.

34 Cases that cite this headnote

[5] **Civil Rights**
⇐Vicarious liability; respondeat superior

General rule is that sexual harassment by supervisor is not conduct within scope of employment for purposes of employer liability under agency principles.

99 Cases that cite this headnote

[6] **Civil Rights**
⇐Knowledge or notice; preventive or remedial measures

Although supervisor's sexual harassment is outside scope of employment because conduct was for personal motives, employer can be liable, nonetheless, where its own negligence is cause of harassment; employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it.

115 Cases that cite this headnote

[7] **Principal and Agent**
⇐Rights and liabilities of principal

Apparent authority is relevant to principal's vicarious liability where agent purports to exercise power which he or she does not have, as distinct from where agent threatens to misuse actual power.

9 Cases that cite this headnote

[8] **Civil Rights**
⇐Vicarious liability; respondeat superior

Under "aided in the agency relation" standard for vicarious liability, more than mere presence of employment relation that aids in commission of harassment is necessary to hold employer liable for supervisor's action; however, whatever exact contours of standard, vicarious liability may be found under standard when supervisor's discriminatory act results in tangible employment action against employee.

74 Cases that cite this headnote

[9] **Civil Rights**
⇐Vicarious liability; respondeat superior

Tangible employment action taken by supervisor becomes for Title VII purposes the act of employer. Civil Rights Act of 1964, §§ 701 et seq., 701(b), 42 U.S.C.A. §§ 2000e et seq., 2000e(b).

73 Cases that cite this headnote

[10] **Civil Rights**
⇐Hostile environment; severity, pervasiveness, and frequency
Civil Rights
⇐Hostile environment; severity, pervasiveness, and frequency
Civil Rights
⇐Vicarious liability; respondeat superior
Civil Rights
⇐Sex discrimination

Employer is subject to vicarious liability to victimized employee for actionable hostile environment created by supervisor with immediate (or successively higher) authority over employee; when no tangible employment

action is taken, employer may raise affirmative defense to liability or damages, subject to proof by preponderance of the evidence. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
1118 Cases that cite this headnote

[11] **Civil Rights**
⇐Knowledge or notice; preventive or remedial measures
Civil Rights
⇐Vicarious liability; respondeat superior

Employer's affirmative defense to vicarious liability for supervisor's creation of hostile work environment comprises two necessary elements: (a) that employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by employer or to avoid harm otherwise. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
1462 Cases that cite this headnote

[12] **Civil Rights**
⇐Vicarious liability; respondeat superior

Employer has no affirmative defense to vicarious liability for supervisor's harassing conduct in violation of Title VII when supervisor's harassment culminates in tangible employment action, such as discharge, demotion, or undesirable reassignment. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
1114 Cases that cite this headnote

[13] **Civil Rights**
⇐Hostile environment; severity, pervasiveness, and frequency
Civil Rights
⇐Knowledge or notice; preventive or remedial measures
Civil Rights
⇐Vicarious liability; respondeat superior

Employer might be held vicariously liable under Title VII for supervisor's making unwelcome and threatening sexual advances to employee, even though conduct did not result in tangible job consequences for employee; however, employer could avoid liability by showing by preponderance of evidence that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and employee unreasonably failed to use preventive or corrective measures provided by employer. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
1639 Cases that cite this headnote

****2259 *742 *Syllabus**

Respondent Kimberly Ellerth quit her job after 15 months as a salesperson in one of petitioner Burlington Industries' many divisions, allegedly because she had been subjected to constant sexual harassment by one of her supervisors, Ted Slowik. Slowik was a midlevel manager who had authority to hire and promote employees, subject to higher approval, but was not considered a policymaker. Against a background of repeated boorish and offensive remarks and gestures allegedly made by Slowik, Ellerth places particular emphasis on three incidents where Slowik's comments could be construed as threats to deny her tangible job benefits. Ellerth refused all of Slowik's advances, yet suffered no tangible retaliation and was, in fact, promoted once. Moreover, she never informed anyone in authority about Slowik's conduct, despite knowing Burlington had a policy against sexual harassment. In filing this lawsuit, Ellerth alleged Burlington engaged in sexual harassment and forced her constructive discharge, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The District Court granted Burlington summary judgment. The Seventh Circuit en banc reversed in a decision that produced eight separate opinions and no consensus for a controlling rationale. Among other things, those opinions focused on whether Ellerth's claim could be categorized as one of *quid pro quo* harassment, and on whether the standard for an employer's liability on such a claim should be vicarious liability or negligence.

Held: Under Title VII, an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, may recover against the employer without showing the employer is negligent or otherwise at fault for

the supervisor's actions, but the employer may interpose an affirmative defense. Pp. 2264-2271.

(a) The Court assumes an important premise yet to be established: A trier of fact could find in Slowik's remarks numerous threats to retaliate against Ellerth if she denied some sexual liberties. The threats, however, were not carried out. Cases based on carried-out threats are referred to often as "*quid pro quo*" cases, as distinct from bothersome attentions or sexual remarks sufficient to create a "hostile work environment." Those two terms do not appear in Title VII, which forbids only ***743** "discriminat[ion] against any individual with respect to his ... terms [or] conditions ... of employment, because of ... sex." § 2000e-2(a)(1). In *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 65, 106 S.Ct. 2399, 2404-2405, 91 L.Ed.2d 49, this Court distinguished between the two concepts, saying both are cognizable under Title VII, though a hostile environment claim requires harassment that is severe or pervasive. *Meritor* did not discuss the distinction for its bearing upon an employer's liability for discrimination, but held, with no further specifics, that agency principles controlled on this point. *Id.,* at 72, 106 S.Ct., at 2408-2409. Nevertheless, in *Meritor's* wake, Courts of Appeals held that, if the plaintiff established a *quid pro quo* claim, the employer was subject to vicarious liability. This rule encouraged Title VII plaintiffs to state their claims in *quid pro quo* terms, which in turn ****2260** put expansive pressure on the definition. For example, the question presented here is phrased as whether Ellerth can state a *quid pro quo* claim, but the issue of real concern to the parties is whether Burlington has vicarious liability, rather than liability limited to its own negligence. This Court nonetheless believes the two terms are of limited utility. To the extent they illustrate the distinction between cases involving a carried-out threat and offensive conduct in general, they are relevant when there is a threshold question whether a plaintiff can prove discrimination. Hence, Ellerth's claim involves only unfulfilled threats, so it is a hostile work environment claim requiring a showing of severe or pervasive conduct. This Court accepts the District Court's finding that Ellerth made such a showing. When discrimination is thus proved, the factors discussed below, not the categories *quid pro quo* and hostile work environment, control on the issue of vicarious liability. Pp. 2264-2265.

(b) In deciding whether an employer has vicarious liability in a case such as this, the Court turns to agency law principles, for Title VII defines the term "employer" to include "agents." § 2000e(b). Given this express direction, the Court concludes a uniform and predictable standard must be established as a matter of federal law. The Court relies on the general common law of agency, rather than on the law of any particular State. *Community for Creative Non-Violence v. Reid,* 490 U.S. 730, 740, 109 S.Ct. 2166, 2172, 104 L.Ed.2d 811. The Restatement (Second) of Agency (hereinafter Restatement) is a useful beginning point, although common-law principles may not be wholly transferable to Title VII. See *Meritor, supra,* at 72, 106 S.Ct., at 2408. Pp. 2265-2266.

(c) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment. Restatement § 219(1). Although such torts generally may be either negligent or intentional, sexual harassment under Title VII presupposes intentional conduct. An intentional tort is within the scope of employment when ***744** actuated, at least in part, by a purpose to serve the employer. *Id.,* §§ 228(1)(c), 230. Courts of Appeals have held, however, a supervisor acting out of gender-based animus or a desire to fulfill sexual urges may be actuated by personal motives unrelated and even antithetical to the employer's objectives. Thus, the general rule is that sexual harassment by a supervisor is not conduct within the scope of employment. Pp. 2265-2267.

(d) However, scope of employment is not the only basis for employer liability under agency principles. An employer is subject to liability for the torts of its employees acting outside the scope of their employment when, *inter alia,* the employer itself was negligent or reckless, Restatement § 219(2)(b), or the employee purported to act or to speak on behalf of the employer and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation, *id.,* § 219(2)(d). An employer is negligent, and therefore subject to liability under § 219(2)(b), if it knew or should have known about sexual harassment and failed to stop it. Negligence sets a minimum standard for Title VII liability; but Ellerth seeks to invoke the more stringent standard of vicarious liability. Section 219(2)(d) makes an employer vicariously liable for sexual harassment by an employee who uses apparent authority (the apparent authority standard), or who was "aided in accomplishing the tort by the existence of the agency relation" (the aided in the agency relation standard). P. 2267.

(e) As a general rule, apparent authority is relevant where the agent purports to exercise a power which he or she does not have, as distinct from threatening to misuse actual power. Compare Restatement § 6 with § 8. Because supervisory harassment cases involve misuse of actual power, not the false impression of its existence, apparent authority analysis is inappropriate. When a party seeks to impose vicarious liability based on an agent's misuse of delegated authority, the Restatement's aided in the agency relation rule provides the appropriate analysis. Pp. 2267-2268.

(f) That rule requires the existence of something more than the employment relation itself because, in a sense, most workplace **2261 tortfeasors, whether supervisors or co-workers, are aided in accomplishing their tortious objective by the employment relation: Proximity and regular contact afford a captive pool of potential victims. Such an additional aid exists when a supervisor subjects a subordinate to a significant, tangible employment action, *i.e.,* a significant change in employment status, such as discharge, demotion, or undesirable reassignment. Every Federal Court of Appeals to have considered the question has correctly found vicarious liability in that circumstance. This Court imports the significant, tangible employment action concept for resolution of the vicarious *745 liability issue considered here. An employer is therefore subject to vicarious liability for such actions. However, where, as here, there is no tangible employment action, it is not obvious the agency relationship aids in commission of the tort. Moreover, *Meritor* holds that agency principles constrain the imposition of employer liability for supervisor harassment. Limiting employer liability is also consistent with Title VII's purpose to the extent it would encourage the creation and use of antiharassment policies and grievance procedures. Thus, in order to accommodate the agency principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees, the Court adopts, in this case and in *Faragher v. Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), the following holding: An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action. Pp. 2268-2270.

(g) Given the Court's explanation that the labels *quid pro quo* and hostile work environment are not controlling for employer-liability purposes, Ellerth should have an adequate opportunity on remand to prove she has a claim which would result in vicarious liability. Although she has not alleged she suffered a tangible employment action at Slowik's hands, which would deprive Burlington of the affirmative defense, this is not dispositive. In light of the Court's decision, Burlington is still *746 subject to vicarious liability for Slowik's activity, but should have an opportunity to assert and prove the affirmative defense. P. 2271.

123 F.3d 490, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SOUTER, and BREYER, JJ., joined. GINSBURG, J., filed an opinion concurring in the judgment, *post,* p. 2271. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post,* p. 2271.

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Opinion

**2262 Justice KENNEDY delivered the opinion of the Court.

We decide whether, under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et* *747 *seq.,* an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions.

I

Summary judgment was granted for the employer, so we

must take the facts alleged by the employee to be true. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962) *(per curiam)*. The employer is Burlington Industries, the petitioner. The employee is Kimberly Ellerth, the respondent. From March 1993 until May 1994, Ellerth worked as a salesperson in one of Burlington's divisions in Chicago, Illinois. During her employment, she alleges, she was subjected to constant sexual harassment by her supervisor, one Ted Slowik.

In the hierarchy of Burlington's management structure, Slowik was a midlevel manager. Burlington has eight divisions, employing more than 22,000 people in some 50 plants around the United States. Slowik was a vice president in one of five business units within one of the divisions. He had authority to make hiring and promotion decisions subject to the approval of his supervisor, who signed the paperwork. See 912 F.Supp. 1101, 1119, n. 14 (N.D.Ill.1996). According to Slowik's supervisor, his position was "not considered an upper-level management position," and he was "not amongst the decision-making or policy-making hierarchy." *Ibid.* Slowik was not Ellerth's immediate supervisor. Ellerth worked in a two-person office in Chicago, and she answered to her office colleague, who in turn answered to Slowik in New York.

Against a background of repeated boorish and offensive remarks and gestures which Slowik allegedly made, Ellerth places particular emphasis on three alleged incidents where Slowik's comments could be construed as threats to deny her ***748** tangible job benefits. In the summer of 1993, while on a business trip, Slowik invited Ellerth to the hotel lounge, an invitation Ellerth felt compelled to accept because Slowik was her boss. App. 155. When Ellerth gave no encouragement to remarks Slowik made about her breasts, he told her to "loosen up" and warned, "you know, Kim, I could make your life very hard or very easy at Burlington." *Id.*, at 156.

In March 1994, when Ellerth was being considered for a promotion, Slowik expressed reservations during the promotion interview because she was not "loose enough." *Id.*, at 159. The comment was followed by his reaching over and rubbing her knee. *Ibid.* Ellerth did receive the promotion; but when Slowik called to announce it, he told Ellerth, "you're gonna be out there with men who work in factories, and they certainly like women with pretty butts/legs." *Id.*, at 159-160.

In May 1994, Ellerth called Slowik, asking permission to insert a customer's logo into a fabric sample. Slowik responded, "I don't have time for you right now, Kim ...-unless you want to tell me what you're wearing." *Id.*, at 78. Ellerth told Slowik she had to go and ended the call. *Ibid.* A day or two later, Ellerth called Slowik to ask permission again. This time he denied her request, but added something along the lines of, "are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier." *Id.*, at 79.

A short time later, Ellerth's immediate supervisor cautioned her about returning telephone calls to customers in a prompt fashion. 912 F.Supp., at 1109. In response, Ellerth quit. She faxed a letter giving reasons unrelated to the alleged sexual harassment we have described. *Ibid.* About three weeks later, however, she sent a letter explaining she quit because of Slowik's behavior. *Ibid.*

During her tenure at Burlington, Ellerth did not inform anyone in authority about Slowik's conduct, despite knowing Burlington had a policy against sexual harassment. *Ibid.* ***749** In fact, she chose not to inform her ****2263** immediate supervisor (not Slowik) because " 'it would be his duty as my supervisor to report any incidents of sexual harassment.' " *Ibid.* On one occasion, she told Slowik a comment he made was inappropriate. *Ibid.*

In October 1994, after receiving a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC), Ellerth filed suit in the United States District Court for the Northern District of Illinois, alleging Burlington engaged in sexual harassment and forced her constructive discharge, in violation of Title VII. The District Court granted summary judgment to Burlington. The court found Slowik's behavior, as described by Ellerth, severe and pervasive enough to create a hostile work environment, but found Burlington neither knew nor should have known about the conduct. There was no triable issue of fact on the latter point, and the court noted Ellerth had not used Burlington's internal complaint procedures. *Id.*, at 1118. Although Ellerth's claim was framed as a hostile work environment complaint, the District Court observed there was a *quid pro quo* "component" to the hostile environment. *Id.*, at 1121. Proceeding from the premise that an employer faces vicarious liability for *quid pro quo* harassment, the District Court thought it necessary to apply a negligence standard because the *quid pro quo* merely contributed to the hostile work environment. See *id.*, at 1123. The District Court also dismissed Ellerth's constructive discharge claim.

The Court of Appeals en banc reversed in a decision which produced eight separate opinions and no consensus for a controlling rationale. The judges were able to agree on the problem they confronted: Vicarious liability, not failure to comply with a duty of care, was the essence of Ellerth's case against Burlington on appeal. The judges seemed to agree Ellerth could recover if Slowik's unfulfilled threats to deny her tangible job benefits was sufficient to impose vicarious liability on Burlington. *Jansen v. Packaging Corp.* ***750** *of America*, 123 F.3d 490, 494 (C.A.7 1997) (*per curiam*). With the exception of Judges Coffey and Easterbrook, the judges also agreed Ellerth's claim could

be categorized as one of *quid pro quo* harassment, even though she had received the promotion and had suffered no other tangible retaliation. *Ibid.*

The consensus disintegrated on the standard for an employer's liability for such a claim. Six judges, Judges Flaum, Cummings, Bauer, Evans, Rovner, and Diane P. Wood, agreed the proper standard was vicarious liability, and so Ellerth could recover even though Burlington was not negligent. *Ibid.* They had different reasons for the conclusion. According to Judges Flaum, Cummings, Bauer, and Evans, whether a claim involves a *quid pro quo* determines whether vicarious liability applies; and they in turn defined *quid pro quo* to include a supervisor's threat to inflict a tangible job injury whether or not it was completed. *Id.*, at 499. Judges Wood and Rovner interpreted agency principles to impose vicarious liability on employers for most claims of supervisor sexual harassment, even absent a *quid pro quo*. *Id.*, at 565.

Although Judge Easterbrook did not think Ellerth had stated a *quid pro quo* claim, he would have followed the law of the controlling State to determine the employer's liability, and by this standard, the employer would be liable here. *Id.*, at 552. In contrast, Judge Kanne said Ellerth had stated a *quid pro quo* claim, but negligence was the appropriate standard of liability when the *quid pro quo* involved threats only. *Id.*, at 505.

Chief Judge Posner, joined by Judge Manion, disagreed. He asserted Ellerth could not recover against Burlington despite having stated a *quid pro quo* claim. According to Chief Judge Posner, an employer is subject to vicarious liability for "act[s] that significantly alte[r] the terms or conditions of employment," or "company act[s]." *Id.*, at 515. In the emergent terminology, an unfulfilled *quid pro quo* is a ***751** mere threat to do a company act rather than the act itself, and in these circumstances, an employer can be found liable for its negligence only. *Ibid.* Chief Judge Posner also found Ellerth failed to create a triable issue of fact as to Burlington's negligence. *Id.*, at 517.

Judge Coffey rejected all of the above approaches because he favored a uniform ****2264** standard of negligence in almost all sexual harassment cases. *Id.*, at 518.

The disagreement revealed in the careful opinions of the judges of the Court of Appeals reflects the fact that Congress has left it to the courts to determine controlling agency law principles in a new and difficult area of federal law. We granted certiorari to assist in defining the relevant standards of employer liability. 522 U.S. 1086, 118 S.Ct. 876, 139 L.Ed.2d 865 (1998).

II

[1] At the outset, we assume an important proposition yet to be established before a trier of fact. It is a premise assumed as well, in explicit or implicit terms, in the various opinions by the judges of the Court of Appeals. The premise is: A trier of fact could find in Slowik's remarks numerous threats to retaliate against Ellerth if she denied some sexual liberties. The threats, however, were not carried out or fulfilled. Cases based on threats which are carried out are referred to often as *quid pro quo* cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment. The terms *quid pro quo* and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility.

Section 703(a) of Title VII forbids

> "an employer-
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or ***752** privileges of employment, because of such individual's ... sex." 42 U.S.C. § 2000e-2(a)(1).

"*Quid pro quo* " and "hostile work environment" do not appear in the statutory text. The terms appeared first in the academic literature, see C. MacKinnon, Sexual Harassment of Working Women (1979); found their way into decisions of the Courts of Appeals, see, *e.g.*, *Henson v. Dundee*, 682 F.2d 897, 909 (C.A.11 1982); and were mentioned in this Court's decision in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). See generally E. Scalia, The Strange Career of *Quid Pro Quo* Sexual Harassment, 21 Harv. J.L. & Pub. Policy 307 (1998).

In *Meritor*, the terms served a specific and limited purpose. There we considered whether the conduct in question constituted discrimination in the terms or conditions of employment in violation of Title VII. We assumed, and with adequate reason, that if an employer demanded sexual favors from an employee in return for a job benefit, discrimination with respect to terms or conditions of employment was explicit. Less obvious was whether an employer's sexually demeaning behavior altered terms or conditions of employment in violation of Title VII. We distinguished between *quid pro quo* claims and hostile environment claims, see 477 U.S., at 65, 106 S.Ct., at 2404-2405, and said both were cognizable under Title VII, though the latter requires harassment that is severe or pervasive. *Ibid.* The principal significance of the distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be

severe or pervasive. The distinction was not discussed for its bearing upon an employer's liability for an employee's discrimination. On this question *Meritor* held, with no further specifics, that agency principles controlled. *Id.*, at 72, 106 S.Ct., at 2408.

Nevertheless, as use of the terms grew in the wake of *Meritor*, they acquired their own significance. The standard of employer responsibility turned on which type of harassment ***753** occurred. If the plaintiff established a *quid pro quo* claim, the Courts of Appeals held, the employer was subject to vicarious liability. See *Davis v. Sioux City*, 115 F.3d 1365, 1367 (C.A.8 1997); *Nichols v. Frank*, 42 F.3d 503, 513-514 (C.A.9 1994); *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 106-107 (C.A.3 1994); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (C.A.10 1993); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-186 (C.A.6), cert. denied, 506 U.S. 1041, 113 S.Ct. 831, 121 L.Ed.2d 701 (1992); ****2265** *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (C.A.11 1989). The rule encouraged Title VII plaintiffs to state their claims as *quid pro quo* claims, which in turn put expansive pressure on the definition. The equivalence of the *quid pro quo* label and vicarious liability is illustrated by this case. The question presented on certiorari is whether Ellerth can state a claim of *quid pro quo* harassment, but the issue of real concern to the parties is whether Burlington has vicarious liability for Slowik's alleged misconduct, rather than liability limited to its own negligence. The question presented for certiorari asks:

> "Whether a claim of *quid pro quo* sexual harassment may be stated under Title VII ... where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of a refusal to submit to those advances?" Pet. for Cert. i.

[2] We do not suggest the terms *quid pro quo* and hostile work environment are irrelevant to Title VII litigation. To the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII. When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the ***754** employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive. Because Ellerth's claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct. See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81, 118 S.Ct. 998, 1002-1003, 140 L.Ed.2d 201, (1998); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993). For purposes of this case, we accept the District Court's finding that the alleged conduct was severe or pervasive. See *supra*, at 2262-2263. The case before us involves numerous alleged threats, and we express no opinion as to whether a single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment.

When we assume discrimination can be proved, however, the factors we discuss below, and not the categories *quid pro quo* and hostile work environment, will be controlling on the issue of vicarious liability. That is the question we must resolve.

III

[3] We must decide, then, whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate's terms or conditions of employment, based on sex, but does not fulfill the threat. We turn to principles of agency law, for the term "employer" is defined under Title VII to include "agents." 42 U.S.C. § 2000e(b); see *Meritor, supra*, at 72, 106 S.Ct., at 2408-2409. In express terms, Congress has directed federal courts to interpret Title VII based on agency principles. Given such an explicit instruction, we conclude a uniform and predictable standard must be established as a matter of federal law. We rely "on the general common law of agency, rather than on the law of any particular State, to give meaning to these ***755** terms." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740, 109 S.Ct. 2166, 2173, 104 L.Ed.2d 811 (1989). The resulting federal rule, based on a body of case law developed over time, is statutory interpretation pursuant to congressional direction. This is not federal common law in "the strictest sense, *i.e.*, a rule of decision that amounts, not simply to an interpretation of a federal statute ..., but, rather, to the judicial 'creation' of a special federal rule of decision." *Atherton v. FDIC*, 519 U.S. 213, 218, 117 S.Ct. 666, 670, 136 L.Ed.2d 656 (1997). State-court decisions, applying state employment discrimination law, may be instructive in applying general agency principles, but, it is interesting to note, in many cases their determinations of employer liability under state law rely in large part on ****2266** federal-court decisions under Title VII. *E.g.*, *Arizona v. Schallock*, 189 Ariz. 250, 259, 941 P.2d 1275, 1284 (1997); *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587, 622, 626 A.2d 445, 463 (1993);

Thompson v. Berta Enterprises, Inc., 72 Wash.App. 531, 537-539, 864 P.2d 983, 986-988 (1994).

As *Meritor* acknowledged, the Restatement (Second) of Agency (1957) (hereinafter Restatement) is a useful beginning point for a discussion of general agency principles. 477 U.S., at 72, 106 S.Ct., at 2408. Since our decision in *Meritor*, federal courts have explored agency principles, and we find useful instruction in their decisions, noting that "common-law principles may not be transferable in all their particulars to Title VII." *Ibid.* The EEOC has issued Guidelines governing sexual harassment claims under Title VII, but they provide little guidance on the issue of employer liability for supervisor harassment. See 29 CFR § 1604.11(c) (1997) (vicarious liability for supervisor harassment turns on "the particular employment relationship and the job functions performed by the individual").

A

Section 219(1) of the Restatement sets out a central principle of agency law:

> **756* "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."

[4] An employer may be liable for both negligent and intentional torts committed by an employee within the scope of his or her employment. Sexual harassment under Title VII presupposes intentional conduct. While early decisions absolved employers of liability for the intentional torts of their employees, the law now imposes liability where the employee's "purpose, however misguided, is wholly or in part to further the master's business." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 70, p. 505 (5th ed.1984) (hereinafter Prosser and Keeton on Torts). In applying scope of employment principles to intentional torts, however, it is accepted that "it is less likely that a willful tort will properly be held to be in the course of employment and that the liability of the master for such torts will naturally be more limited." F. Mechem, Outlines of the Law of Agency § 394, p. 266 (P. Mechem 4th ed. 1952). The Restatement defines conduct, including an intentional tort, to be within the scope of employment when "actuated, at least in part, by a purpose to serve the [employer]," even if it is forbidden by the employer. Restatement §§ 228(1)(c), 230. For example, when a salesperson lies to a customer to make a sale, the tortious conduct is within the scope of employment because it benefits the employer by increasing sales, even though it may violate the employer's policies. See Prosser and Keeton on Torts § 70, at 505-506.

As Courts of Appeals have recognized, a supervisor acting out of gender-based animus or a desire to fulfill sexual urges may not be actuated by a purpose to serve the employer. See, *e.g.*, *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1444 (C.A.10 1997), vacated on other grounds, 524 U.S. 947, 118 S.Ct. 2364, 141 L.Ed.2d 732 (1998); *Torres v. Pisano*, 116 F.3d 625, 634, n. 10 (C.A.2 1997). But see *Kauffman v. Allied Signal, Inc.*, 970 F.2d, at 184-185 (holding harassing supervisor acted within scope of employment, **757* but employer was not liable because of its quick and effective remediation). The harassing supervisor often acts for personal motives, motives unrelated and even antithetical to the objectives of the employer. Cf. Mechem, *supra*, § 368 ("[F]or the time being [the supervisor] is conspicuously and unmistakably seeking a personal end"); see also Restatement § 235, Illustration 2 (tort committed while "[a]cting purely from personal ill will" not within the scope of employment); *id.*, Illustration 3 (tort committed in retaliation for failing to pay the employee a bribe not within the scope of employment). There are instances, of course, where a supervisor engages in unlawful discrimination with the purpose, mistaken or otherwise, to serve the employer. *E.g.*, *Sims v. Montgomery County Comm'n*, 766 F.Supp. 1052, 1075 (M.D.Ala.1990) (supervisor acting in scope of employment where employer has a policy of discouraging women from seeking advancement ***2267* and "sexual harassment was simply a way of furthering that policy").

The concept of scope of employment has not always been construed to require a motive to serve the employer. *E.g.*, *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 172 (C.A.2 1968). Federal courts have nonetheless found similar limitations on employer liability when applying the agency laws of the States under the Federal Tort Claims Act, which makes the Federal Government liable for torts committed by employees within the scope of employment. 28 U.S.C. § 1346(b); see, *e.g.*, *Jamison v. Wiley*, 14 F.3d 222, 237 (C.A.4 1994) (supervisor's unfair criticism of subordinate's work in retaliation for rejecting his sexual advances not within scope of employment); *Wood v. United States*, 995 F.2d 1122, 1123 (C.A.1 1993) (BREYER, C.J.) (sexual harassment amounting to assault and battery "clearly outside the scope of employment"); see also 2 L. Jayson & R. Longstreth, Handling Federal Tort Claims § 9.07[4], p. 9-211 (1998).

[5] The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment.

***758 B**

Scope of employment does not define the only basis for employer liability under agency principles. In limited circumstances, agency principles impose liability on employers even where employees commit torts outside the scope of employment. The principles are set forth in the much-cited § 219(2) of the Restatement:

> "(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> "(a) the master intended the conduct or the consequences, or
>
> "(b) the master was negligent or reckless, or
>
> "(c) the conduct violated a non-delegable duty of the master, or
>
> "(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."

See also § 219, Comment *e* (Section 219(2) "enumerates the situations in which a master may be liable for torts of servants acting solely for their own purposes and hence not in the scope of employment").

Subsection (a) addresses direct liability, where the employer acts with tortious intent, and indirect liability, where the agent's high rank in the company makes him or her the employer's alter ego. None of the parties contend Slowik's rank imputes liability under this principle. There is no contention, furthermore, that a nondelegable duty is involved. See § 219(2)(c). So, for our purposes here, subsections (a) and (c) can be put aside.

[6] Subsections (b) and (d) are possible grounds for imposing employer liability on account of a supervisor's acts and must be considered. Under subsection (b), an employer is liable when the tort is attributable to the employer's own negligence. ***759** § 219(2)(b). Thus, although a supervisor's sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it. Negligence sets a minimum standard for employer liability under Title VII; but Ellerth seeks to invoke the more stringent standard of vicarious liability.

Section 219(2)(d) concerns vicarious liability for intentional torts committed by an employee when the employee uses apparent authority (the apparent authority standard), or when the employee "was aided in accomplishing the tort by the existence of the agency relation" (the aided in the agency relation standard). *Ibid.* As other federal decisions have done in discussing vicarious liability for supervisor harassment, *e.g., Henson v. Dundee,* 682 F.2d 897, 909 (C.A.11 1982), we begin with § 219(2)(d).

C

[7] As a general rule, apparent authority is relevant where the agent purports to exercise a power which he or she does not have, ****2268** as distinct from where the agent threatens to misuse actual power. Compare Restatement § 6 (defining "power") with § 8 (defining "apparent authority"). In the usual case, a supervisor's harassment involves misuse of actual power, not the false impression of its existence. Apparent authority analysis therefore is inappropriate in this context. If, in the unusual case, it is alleged there is a false impression that the actor was a supervisor, when he in fact was not, the victim's mistaken conclusion must be a reasonable one. Restatement § 8, Comment *c* ("Apparent authority exists only to the extent it is reasonable for the third person dealing with the agent to believe that the agent is authorized"). When a party seeks to impose vicarious liability ***760** based on an agent's misuse of delegated authority, the Restatement's aided in the agency relation rule, rather than the apparent authority rule, appears to be the appropriate form of analysis.

D

[8] We turn to the aided in the agency relation standard. In a sense, most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims. See *Gary v. Long,* 59 F.3d 1391, 1397 (C.A.D.C.1995). Were this to satisfy the aided in the agency relation standard, an employer would be subject to vicarious liability not only for all supervisor harassment, but also for all co-worker harassment, a result enforced by neither the EEOC nor any court of appeals to have considered the issue. See, *e.g., Blankenship v. Parke Care Centers, Inc.,* 123 F.3d 868, 872 (C.A.6 1997), cert. denied, 522 U.S. 1110, 118 S.Ct. 1039, 140 L.Ed.2d 105 (1998) (sex discrimination); *McKenzie v. Illinois Dept. of Transp.,* 92 F.3d 473, 480 (C.A.7 1996) (sex discrimination); *Daniels v. Essex Group, Inc.,* 937 F.2d 1264, 1273 (C.A.7 1991) (race

discrimination); see also 29 C.F.R. § 1604.11(d) (1997) ("knows or should have known" standard of liability for cases of harassment between "fellow employees"). The aided in the agency relation standard, therefore, requires the existence of something more than the employment relation itself.

At the outset, we can identify a class of cases where, beyond question, more than the mere existence of the employment relation aids in commission of the harassment: when a supervisor takes a tangible employment action against the subordinate. Every Federal Court of Appeals to have considered the question has found vicarious liability when a discriminatory act results in a tangible employment action. See, *e.g., Sauers v. Salt Lake County,* 1 F.3d 1122, 1127 (C.A.10 1993) (" 'If the plaintiff can show that she suffered an economic injury from her supervisor's actions, the employer becomes strictly liable without any further showing ...' "). ***761** In *Meritor,* we acknowledged this consensus. See 477 U.S., at 70-71, 106 S.Ct., at 2407-2408 ("[T]he courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, or should have known, or approved of the supervisor's actions"). Although few courts have elaborated how agency principles support this rule, we think it reflects a correct application of the aided in the agency relation standard.

In the context of this case, a tangible employment action would have taken the form of a denial of a raise or a promotion. The concept of a tangible employment action appears in numerous cases in the Courts of Appeals discussing claims involving race, age, and national origin discrimination, as well as sex discrimination. Without endorsing the specific results of those decisions, we think it prudent to import the concept of a tangible employment action for resolution of the vicarious liability issue we consider here. A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. Compare *Crady v. Liberty Nat. Bank & Trust Co. of Ind.,* 993 F.2d 132, 136 (C.A.7 1993) ("A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly ****2269** diminished material responsibilities, or other indices that might be unique to a particular situation"), with *Flaherty v. Gas Research Institute,* 31 F.3d 451, 456 (C.A.7 1994) (a "bruised ego" is not enough), *Kocsis v. Multi-Care Management, Inc.,* 97 F.3d 876, 887 (C.A.6 1996) (demotion without change in pay, benefits, duties, or prestige insufficient), and *Harlston v. McDonnell Douglas Corp.,* 37 F.3d 379, 382 (C.A.8 1994) (reassignment to more inconvenient job insufficient).

When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted ***762** absent the agency relation. A tangible employment action in most cases inflicts direct economic harm. As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury. A co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct. See *Gary, supra,* at 1397; *Henson,* 682 F.2d, at 910; *Barnes v. Costle,* 561 F.2d 983, 996 (C.A.D.C.1977) (MacKinnon, J., concurring). But one co-worker (absent some elaborate scheme) cannot dock another's pay, nor can one co-worker demote another. Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.

Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors. *E.g., Shager v. Upjohn Co.,* 913 F.2d 398, 405 (C.A.7 1990) (noting that the supervisor did not fire plaintiff; rather, the Career Path Committee did, but the employer was still liable because the committee functioned as the supervisor's "cat's-paw"). The supervisor often must obtain the imprimatur of the enterprise and use its internal processes. See *Kotcher v. Rosa & Sullivan Appliance Center, Inc.,* 957 F.2d 59, 62 (C.A.2 1992) ("From the perspective of the employee, the supervisor and the employer merge into a single entity").

[9] For these reasons, a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer. Whatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action ***763** against a subordinate. In that instance, it would be implausible to interpret agency principles to allow an employer to escape liability, as *Meritor* itself appeared to acknowledge. See, *supra,* at 2268.

Whether the agency relation aids in commission of supervisor harassment which does not culminate in a tangible employment action is less obvious. Application of the standard is made difficult by its malleable terminology, which can be read to either expand or limit liability in the

context of supervisor harassment. On the one hand, a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation. See *Meritor*, 477 U.S., at 77, 106 S.Ct., at 2410-2411 (Marshall, J., concurring in judgment) ("[I]t is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates"). On the other hand, there are acts of harassment a supervisor might commit which might be the same acts a coemployee would commit, and there may be some circumstances where the supervisor's status makes little difference.

It is this tension which, we think, has caused so much confusion among the Courts of Appeals which have sought to apply the aided in the agency relation standard to Title VII cases. The aided in the agency relation standard, however, is a developing feature of agency law, and we hesitate to render a definitive explanation of our understanding of the standard in an area where other important considerations must affect our judgment. **2270 In particular, we are bound by our holding in *Meritor* that agency principles constrain the imposition of vicarious liability in cases of supervisory harassment. See *id.*, at 72, 106 S.Ct., at 2408 ("Congress' decision to define 'employer' to include any 'agent' of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible"). Congress has not altered *Meritor*'s *764 rule even though it has made significant amendments to Title VII in the interim. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736, 97 S.Ct. 2061, 2069-2070, 52 L.Ed.2d 707 (1977) ("[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation").

Although *Meritor* suggested the limitation on employer liability stemmed from agency principles, the Court acknowledged other considerations might be relevant as well. See 477 U.S., at 72, 106 S.Ct., at 2408 ("common-law principles may not be transferable in all their particulars to Title VII"). For example, Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context, see *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77, 104 S.Ct. 1621, 1635, 80 L.Ed.2d 41 (1984), and the EEOC's policy of encouraging the development of grievance procedures. See 29 C.F.R. § 1604.11(f) (1997); EEOC Policy Guidance on Sexual Harassment, 8 BNA FEP Manual 405:6699 (Mar. 19, 1990). To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose. See *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 358, 115 S.Ct. 879, 884-885, 130 L.Ed.2d 852 (1995). As we have observed, Title VII borrows from tort law the avoidable consequences doctrine, see *Ford Motor Co. v. EEOC*, 458 U.S. 219, 232, n. 15, 102 S.Ct. 3057, 3066, n. 15, 73 L.Ed.2d 721 (1982), and the considerations which animate that doctrine would also support the limitation of employer liability in certain circumstances.

[10] [11] [12] In order to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees, we adopt the following holding in this case and in *Faragher v. Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), also decided today. *765 An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

**2271 IV

Relying on existing case law which held out the promise of

vicarious liability for all *quid pro quo* claims, see *supra,* at 2264-2265, Ellerth focused all her attention in the Court of Appeals on proving her claim fit within that category. Given our explanation that the labels *quid pro quo* and hostile work environment are not controlling for purposes of establishing employer liability, see *supra,* at 2265, Ellerth ***766** should have an adequate opportunity to prove she has a claim for which Burlington is liable.

[13] Although Ellerth has not alleged she suffered a tangible employment action at the hands of Slowik, which would deprive Burlington of the availability of the affirmative defense, this is not dispositive. In light of our decision, Burlington is still subject to vicarious liability for Slowik's activity, but Burlington should have an opportunity to assert and prove the affirmative defense to liability. See *supra,* at 2270.

For these reasons, we will affirm the judgment of the Court of Appeals, reversing the grant of summary judgment against Ellerth. On remand, the District Court will have the opportunity to decide whether it would be appropriate to allow Ellerth to amend her pleading or supplement her discovery.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice GINSBURG, concurring in the judgment.

I agree with the Court's ruling that "the labels *quid pro quo* and hostile work environment are not controlling for purposes of establishing employer liability." *Ante,* at 2271. I also subscribe to the Court's statement of the rule governing employer liability, *ante,* at 2270, which is substantively identical to the rule the Court adopts in *Faragher v. Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1988).

Justice THOMAS, with whom Justice SCALIA joins, dissenting.

The Court today manufactures a rule that employers are vicariously liable if supervisors create a sexually hostile work environment, subject to an affirmative defense that the Court barely attempts to define. This rule applies even if the employer has a policy against sexual harassment, the employee knows about that policy, and the employee never ***767** informs anyone in a position of authority about the supervisor's conduct. As a result, employer liability under Title VII is judged by different standards depending upon whether a sexually or racially hostile work environment is alleged. The standard of employer liability should be the same in both instances: An employer should be liable if, and only if, the plaintiff proves that the employer was negligent in permitting the supervisor's conduct to occur.

I

Years before sexual harassment was recognized as "discriminat[ion] ... because of ... sex," 42 U.S.C. § 2000e-2(a)(1), the Courts of Appeals considered whether, and when, a racially hostile work environment could violate Title VII.[1] In the landmark case *Rogers v. EEOC,* 454 F.2d 234 (1971), cert. denied, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972), the Court of Appeals for the Fifth Circuit held that the practice of racially segregating patients in a doctor's office could amount to discrimination in " 'the terms, conditions, or privileges' " of employment, thereby violating Title VII. 454 F.2d, at 238 (quoting 42 U.S.C. § 2000e-2(a)(1)). The principal opinion in the case concluded that employment discrimination was not limited to the "isolated and distinguishable events" of "hiring, firing, and promoting." 454 F.2d, at 238 (opinion of Goldberg, J.). Rather, Title VII could also be violated by a work environment "heavily polluted with discrimination," because of the deleterious effects of such an ****2272** atmosphere on an employee's well-being. *Ibid.*

Accordingly, after *Rogers,* a plaintiff claiming employment discrimination based upon race could assert a claim for a racially hostile work environment, in addition to the classic ***768** claim of so-called "disparate treatment." A disparate treatment claim required a plaintiff to prove an adverse employment consequence and discriminatory intent by his employer. See 1 B. Lindemann & P. Grossman, Employment Discrimination Law 10-11 (3d ed.1996). A hostile environment claim required the plaintiff to show that his work environment was so pervaded by racial harassment as to alter the terms and conditions of his employment. See, *e.g., Snell v. Suffolk Cty.,* 782 F.2d 1094, 1103 (C.A.2 1986) ("To establish a hostile atmosphere, ... plaintiffs must prove more than a few isolated incidents of racial enmity"); *Johnson v. Bunny Bread Co.,* 646 F.2d 1250, 1257 (C.A.8 1981) (no violation of Title VII from infrequent use of racial slurs). This is the same standard now used when determining whether sexual harassment renders a work environment hostile. See *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 21, 114 S.Ct. 367, 370-371, 126 L.Ed.2d 295 (1993) (actionable sexual harassment occurs when the workplace is "*permeated* with discriminatory intimidation, ridicule, and insult" (emphasis added; internal quotation marks and citation omitted)).

In race discrimination cases, employer liability has turned

on whether the plaintiff has alleged an adverse employment consequence, such as firing or demotion, or a hostile work environment. If a supervisor takes an adverse employment action because of race, causing the employee a tangible job detriment, the employer is vicariously liable for resulting damages. See *ante,* at 2268. This is because such actions are company acts that can be performed only by the exercise of specific authority granted by the employer, and thus the supervisor acts as the employer. If, on the other hand, the employee alleges a racially hostile work environment, the employer is liable only for negligence: that is, only if the employer knew, or in the exercise of reasonable care should have known, about the harassment and failed to take remedial action. See, *e.g., Dennis v. Cty. of Fairfax,* 55 F.3d 151, 153 (C.A.4 1995); ***769** *Davis v. Monsanto Chemical Co.,* 858 F.2d 345, 349 (C.A.6 1988), cert. denied, 490 U.S. 1110, 109 S.Ct. 3166, 104 L.Ed.2d 1028 (1989). Liability has thus been imposed only if the employer is blameworthy in some way. See, *e.g., Davis v. Monsanto Chemical Co., supra,* at 349; *Snell v. Suffolk Cty., supra,* at 1104; *DeGrace v. Rumsfeld,* 614 F.2d 796, 805 (C.A.1 1980).

This distinction applies with equal force in cases of sexual harassment.[2] When a supervisor inflicts an adverse employment consequence upon an employee who has rebuffed his advances, the supervisor exercises the specific authority granted to him by his company. His acts, therefore, are the company's acts and are properly chargeable to it. See 123 F.3d 490, 514 (C.A.7 1997) (Posner, C. J., dissenting); *ante,* at 2269 ("Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control").

If a supervisor creates a hostile work environment, however, he does not act for the employer. As the Court concedes, a supervisor's creation of a hostile work environment is neither within the scope of his employment, nor part of his apparent authority. See *ante,* at 2265-2268. Indeed, a hostile work environment is antithetical to the interest of the employer. In such circumstances, an employer should be liable only if it has been negligent. That is, liability should attach ****2273** only if the employer either knew, or in the exercise of ***770** reasonable care should have known, about the hostile work environment and failed to take remedial action.[3]

Sexual harassment is simply not something that employers can wholly prevent without taking extraordinary measures-constant video and audio surveillance, for example-that would revolutionize the workplace in a manner incompatible with a free society. See 123 F.3d, at 513 (Posner, C.J., dissenting). Indeed, such measures could not even detect incidents of harassment such as the comments Slowik allegedly made to respondent in a hotel bar. The most that employers can be charged with, therefore, is a duty to act reasonably under the circumstances. As one court recognized in addressing an early racial harassment claim:

> "It may not always be within an employer's power to guarantee an environment free from all bigotry.... [H]e can let it be known, however, that racial harassment will not be tolerated, and he can take all reasonable measures to enforce this policy.... But once an employer has in good faith taken those measures which are both feasible and reasonable under the circumstances to combat the offensive conduct we do not think he can be charged with discriminating on the basis of race." *DeGrace v. Rumsfeld,* 614 F.2d 796, 805 (1980).

***771** Under a negligence standard, Burlington cannot be held liable for Slowik's conduct. Although respondent alleged a hostile work environment, she never contended that Burlington had been negligent in permitting the harassment to occur, and there is no question that Burlington acted reasonably under the circumstances. The company had a policy against sexual harassment, and respondent admitted that she was aware of the policy but nonetheless failed to tell anyone with authority over Slowik about his behavior. See *ante,* at 2262. Burlington therefore cannot be charged with knowledge of Slowik's alleged harassment or with a failure to exercise reasonable care in not knowing about it.

II

Rejecting a negligence standard, the Court instead imposes a rule of vicarious employer liability, subject to a vague affirmative defense, for the acts of supervisors who wield no delegated authority in creating a hostile work environment. This rule is a whole-cloth creation that draws no support from the legal principles on which the Court claims it is based. Compounding its error, the Court fails to explain how employers can rely upon the affirmative defense, thus ensuring a continuing reign of confusion in this important area of the law.

In justifying its holding, the Court refers to our comment in *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), that the lower courts should look to "agency principles" for guidance in determining the scope of employer liability, *id.,* at 72, 106 S.Ct., at 2408. The Court then interprets the term "agency principles" to mean the Restatement (Second) of Agency (1957). The Court finds two portions of the Restatement to

be relevant: § 219(2)(b), which provides that a master is liable for his servant's torts if the master is reckless or negligent, and § 219(2)(d), which states that a master is liable for his servant's torts when the servant is "aided in accomplishing the tort by the existence of the agency relation." The Court ***772** appears to reason that a supervisor is "aided ... by ... the agency relation" in creating a hostile work environment because the supervisor's ****2274** "power and authority invests his or her harassing conduct with a particular threatening character." *Ante,* at 2269.

Section 219(2)(d) of the Restatement provides no basis whatsoever for imposing vicarious liability for a supervisor's creation of a hostile work environment. Contrary to the Court's suggestions, the principle embodied in § 219(2)(d) has nothing to do with a servant's "power and authority," nor with whether his actions appear "threatening." Rather, as demonstrated by the Restatement's illustrations, liability under § 219(2)(d) depends upon the plaintiff's belief that the agent acted in the ordinary course of business or within the scope of his apparent authority.4 In this day and age, no sexually harassed employee can reasonably believe that a harassing supervisor is conducting the official business of the company or acting on its behalf. Indeed, the Court admits as much in demonstrating why sexual harassment is not committed within the scope of a supervisor's employment and is not part of his apparent authority. See *ante,* at 2265-2268.

Thus although the Court implies that it has found guidance in both precedent and statute-see *ante,* at 2265 ("The resulting federal rule, based on a body of case law developed over time, is statutory interpretation pursuant to congressional direction")-its holding is a product of willful policymaking, pure and simple. The only agency principle that justifies imposing employer liability in this context is the principle ***773** that a master will be liable for a servant's torts if the master was negligent or reckless in permitting them to occur; and as noted, under a negligence standard, Burlington cannot be held liable. See *supra,* at 2273.

The Court's decision is also in considerable tension with our holding in *Meritor* that employers are not strictly liable for a supervisor's sexual harassment. See *Meritor Savings Bank, FSB v. Vinson, supra,* at 72, 106 S.Ct., at 2408. Although the Court recognizes an affirmative defense-based solely on its divination of Title VII's *gestalt,* see *ante,* at 2270-it provides shockingly little guidance about how employers can actually avoid vicarious liability. Instead, it issues only Delphic pronouncements and leaves the dirty work to the lower courts:

> "While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense." *Ante,* at 2270.

What these statements mean for district courts ruling on motions for summary judgment-the critical question for employers now subject to the vicarious liability rule-remains a mystery. Moreover, employers will be liable notwithstanding the affirmative defense, *even though they acted reasonably,* so long as the plaintiff in question fulfilled *her* duty of reasonable care to avoid harm. See *ibid.* In practice, therefore, employer liability very well may be the rule. ***774** But as the Court acknowledges, this is the one result that it is clear Congress did *not* intend. See *ante,* at 2269-2270; *Meritor Savings Bank, FSB v. Vinson, supra,* at 72, 106 S.Ct., at 2408.

The Court's holding does guarantee one result: There will be more and more litigation to clarify applicable legal rules in an area in which both practitioners and the courts have long been begging for guidance. It thus truly boggles the mind that the Court can claim that its holding will effect "Congress' intention to promote conciliation rather ****2275** than litigation in the Title VII context." *Ante,* at 2270. All in all, today's decision is an ironic result for a case that generated eight separate opinions in the Court of Appeals on a fundamental question, and in which we granted certiorari "to assist in defining the relevant standards of employer liability." *Ante,* at 2263-2264.

* * *

Popular misconceptions notwithstanding, sexual harassment is not a freestanding federal tort, but a form of employment discrimination. As such, it should be treated no differently (and certainly no better) than the other forms of harassment that are illegal under Title VII. I would restore parallel treatment of employer liability for racial and sexual harassment and hold an employer liable for a hostile work environment only if the employer is truly at fault. I therefore respectfully dissent.

Parallel Citations

118 S.Ct. 2257, 77 Fair Empl.Prac.Cas. (BNA) 1, 170 A.L.R. Fed. 677, 73 Empl. Prac. Dec. P 45,340, 141 L.Ed.2d 633, 66 USLW 4634, 98 Cal. Daily Op. Serv. 5029, 98 Daily Journal D.A.R. 6991, 98 CJ C.A.R. 3405, 11 Fla. L. Weekly Fed. S 692

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 This sequence of events is not surprising, given that the primary goal of the Civil Rights Act of 1964 was to eradicate race discrimination and that the statute's ban on sex discrimination was added as an eleventh-hour amendment in an effort to kill the bill. See *Barnes v. Costle*, 561 F.2d 983, 987 (C.A.D.C.1977).

2 The Courts of Appeals relied on racial harassment cases when analyzing early claims of discrimination based upon a supervisor's sexual harassment. For example, when the Court of Appeals for the District of Columbia Circuit held that a work environment poisoned by a supervisor's "sexually stereotyped insults and demeaning propositions" could itself violate Title VII, its principal authority was Judge Goldberg's opinion in *Rogers v. EEOC*, 454 F.2d 234 (C.A.5 1971). See *Bundy v. Jackson*, 641 F.2d 934, 944 (C.A.D.C.1981); see also *Henson v. Dundee*, 682 F.2d 897, 901 (C.A.11 1982). So, too, this Court relied on *Rogers* when in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), it recognized a cause of action under Title VII for sexual harassment. See *id.*, at 65-66, 106 S.Ct., at 2404-2405.

3 I agree with the Court that the doctrine of *quid pro quo* sexual harassment is irrelevant to the issue of an employer's vicarious liability. I do not, however, agree that the distinction between hostile work environment and *quid pro quo* sexual harassment is relevant "when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII." *Ante*, at 2265. A supervisor's threat to take adverse action against an employee who refuses his sexual demands, if never carried out, may create a hostile work environment, but that is all. Cases involving such threats, without more, should therefore be analyzed as hostile work environment cases only. If, on the other hand, the supervisor carries out his threat and causes the plaintiff a job detriment, the plaintiff may have a disparate treatment claim under Title VII. See E. Scalia, The Strange Career of *Quid Pro Quo* Sexual Harassment, 21 Harv. J.L. & Pub. Policy 307, 309-314 (1998).

4 See Restatement § 219, Comment *e;* § 261, Comment *a* (principal liable for an agent's fraud if "the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of business confided to him"); § 247, Illustrations (newspaper liable for a defamatory editorial published by editor for his own purposes).

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798 F.2d 559
United States Court of Appeals, First Circuit.

Robert H. CALHOUN, Plaintiff, Appellee, v. ACME CLEVELAND CORPORATION and the Cleveland Twist Drill Company, Defendants, Appellants.

No. 85–1952. | Aug. 20, 1986.

Employee brought action against former employer for alleged age discrimination in employment. The United States District Court for the District of Massachusetts, Joseph L. Tauro, J., entered judgment on verdict for employee, and employer appealed. The Court of Appeals, Bownes, Circuit Judge, held that question whether employer's actions amounted to a constructive discharge in violation of Age Discrimination in Employment Act was properly submitted to jury under evidence indicating that, in connection with employer's desire to reduce its work force, preferably by retiring older employees, employee was asked three times in seven months whether he wished to retire and, after indicating in negative, was demoted by employer, reprimanded for doing something he had done before without sanction, excluded from training sessions, and threatened with a drastic increase in working hours.

Affirmed.

West Headnotes (6)

[1] **Civil Rights**
Constructive Discharge

A case for a constructive discharge under Age Discrimination in Employment Act is not established unless trier of fact is satisfied that new working conditions would have been so difficult or unpleasant that a reasonable person in employee's shoes would have felt compelled to resign. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

44 Cases that cite this headnote

[2] **Civil Rights**
Questions of Law or Fact

Allegations concerning hours worked by others after employee was terminated, even if eliminated, did not preclude submission of constructive discharge issue under Age Discrimination in Employment Act given repeated inquiries about resignation, threat of onerous working hours if no resignation, and demotion of employee along with promotion of younger coemployees. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

9 Cases that cite this headnote

[3] **Civil Rights**
Questions of Law or Fact

Evidence that employee, who always received good work ratings and high pay raises until a new manager arrived, was demoted after he refused to retire, reprimanded for doing something he had done before without sanction, excluded from training sessions, and threatened with a drastic increase in working hours was sufficient to warrant submission of issue in constructive discharge case whether a reasonable person in employee's shoes would have felt that his services were no longer desired. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

40 Cases that cite this headnote

[4] **Civil Rights**
Questions of Law or Fact

Question whether employer's actions amounted to a constructive discharge in violation of Age Discrimination in Employment Act was properly submitted to jury under evidence indicating that, in connection with employer's desire to reduce its work force, preferably by retiring older employees, employee was asked three times in seven months whether he wished to retire and,

after indicating in negative, was demoted by employer, reprimanded for doing something he had done before without sanction, excluded from training sessions, and threatened with a drastic increase in working hours. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

7 Cases that cite this headnote

[5] **Federal Civil Procedure**
Instructions Already Given

Denial of requested instruction to effect that constructive discharge case was to be considered and decided by jury as a case between persons of equal standing in community was not an abuse of discretion when trial court admonished jury twice to avoid bias or prejudice. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

2 Cases that cite this headnote

[6] **Federal Civil Procedure**
Statements as to Facts, Comments and Arguments

Metaphorical-alliterative reference by employee in constructive discharge case to "corporate claws" was within normal bounds of creative advocacy and was not such as to warrant giving of employer's requested instruction on anticorporate bias. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

Attorneys and Law Firms

***560** William P. Robinson, III with whom John A. Houlihan, Judith C. Savage, and Edwards & Angell, Providence, R.I., were on brief, for defendants, appellants.

Orlando F. de Abreu with whom Kevin J. McAllister, Taunton, Mass., was on brief, for plaintiff, appellee.

Before BOWNES, Circuit Judge, BROWN,* Senior Circuit Judge, and BREYER, Circuit Judge.

Opinion

BOWNES, Circuit Judge.

Appellants, Acme Cleveland Corporation and its subsidiary The Cleveland Twist Drill Company, appeal from a judgment for their former employee, Robert Calhoun, under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (1982).

Calhoun had contended that, after working for appellants and their predecessors for forty-two years, appellants entered into a course of action designed to force him into early retirement at age sixty-two. It was appellants' contention that they merely asked Calhoun whether he wished to take early retirement and that Calhoun voluntarily decided that he would retire. Since appellants did not actually fire Calhoun, a key legal and factual issue in the case was whether appellants' actions could be considered ***561** to amount to a constructive discharge. Appellants contend that, as a matter of law, the facts alleged and proven by Calhoun did not amount to a constructive discharge and that the district court erred when it failed to grant appellants' motion for summary judgment, directed verdict or judgment n.o.v. Appellants also claim that they were denied a fair trial because the district court failed to give a requested "anticorporate bias" jury instruction requested by appellants.

[1] We consider first the constructive discharge issue. The basic rules governing constructive discharge in this circuit were laid down in *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114 (1st Cir.1977): "the trier of fact must be satisfied that the new working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Id.* at 119. This is an "objective standard," *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir.1985), *cert. denied*, — U.S. —, 106 S.Ct. 1461, 89 L.Ed.2d 718 (1986), in which the focus is upon the "reasonable state of mind of the putative discriminatee." *Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 926 (5th Cir.1982). In making the determination, it must be kept in mind that

> "[a]n employee may not be unreasonably sensitive to his [or her] working environment." *Johnson* [v. *Bunny Bread Co.*], 646 F.2d [1250] at 1256 [(8th Cir.1981)]. Thus the law does not permit an employee's subjective perceptions to govern a claim of constructive

> discharge.... An employee is protected from a calculated effort to pressure him [or her] into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by his [or her] coworkers. He [or she] is not, however, guaranteed a working environment free from stress.

Bristow, 770 F.2d at 1255. The question we must consider, then, is whether, given the factual allegations and evidence presented by Calhoun, there was no constructive discharge as a matter of law. This requires a recitation of the facts.

Aside from three years in the Navy during World War II, Calhoun worked continuously for The Cleveland Twist Drill Company or its predecessor from 1940 until his resignation in 1982. By 1964, he had worked his way up to the position of Manager of the Product Design and Application Department. In every year prior to 1982, Calhoun had received good reviews of his work and yearly raises in pay.

By 1982, The Cleveland Twist Drill Company was having financial problems, particularly because it was not delivering orders on time and was not selling reliable merchandise. As a result, a new plant manager, Clifford Preuss, was hired in February of 1982. On February 17, 1982, Preuss asked all employees eligible for early retirement, including Calhoun who was sixty-two at that time, whether they had any intention of taking early retirement so as to minimize layoffs of junior personnel. Calhoun told Preuss that he wished to continue working until he was sixty-five.

On March 10, 1982, without warning or criticism of Calhoun's past performance, a younger man, Ronald Sabatos, was made Manager of the Product Design and Application Department. Although no cut in his pay was made, Calhoun was demoted to Supervisor of the Department. Thereafter, Calhoun was not invited to participate in a training seminar to which both his immediate superior and junior were invited. Next, Calhoun was told that it was "grounds for dismissal" for him to have brought a portable television into work on Patriot's Day[1], a day that was a holiday for all nonsupervisory personnel, and watched the start and finish of the Boston Marathon, although similar conduct had occurred in the past without comment.

On May 20, 1982, Calhoun had a second meeting with Preuss concerning his retirement plans, as did all other employees eligible ***562** for early retirement. Once again, Calhoun stated that he intended to keep on working. Calhoun had a third meeting with Preuss on August 30, 1982, as did all other retirement-eligible employees. The details of this meeting are in dispute as are other relevant facts.

Calhoun claims that Preuss told him at this meeting that the company was "ready to give him his severance pay and terminate him," albeit with full retirement benefits. The alternative offered by Preuss was that Calhoun would have to be prepared to work a twelve- to fourteen-hour day and Saturdays, as compared to the nine- and nine and one-half-hour day he had been working. Calhoun testified that no one at his level of management had worked such long hours. He also testified that in 1983, after his termination, he had a conversation with his former assistant who told Calhoun that he was not working any longer hours than Calhoun had worked. Preuss testified that Sabatos, the newly hired Product Design Manager, had been working twelve to fourteen hours a day. Preuss also testified that during this August conversation all he did was tell Calhoun about a "new" retirement package that the company had authorized allowing severance for early retirees. Company documents offered by Calhoun, however, indicated that the severance pay provision had been in effect since August of 1981, prior to Calhoun's first meeting with Preuss. Preuss testified that he was unaware of the policy prior to the August 1982 meeting. He also testified that he did not mention any specific number of hours that Calhoun would have to work, but said only that if Calhoun did not choose to retire he would be expected to work the same number of hours as those working under him and possibly some Saturdays. Both Preuss and Calhoun agreed that Calhoun asked Preuss at this meeting whether he could collect unemployment benefits while he was receiving severance pay.

The day after the August 30 meeting, Calhoun told Preuss that he would take early retirement. After leaving The Cleveland Twist Drill Company, where he had been making $34,000 a year with generous benefits, Calhoun sought similar work, but was unable to find it. He worked as a construction worker for $6 to $8 an hour and his income dropped to around $18,000 a year.

Summary Judgment

In his affidavit in opposition to the motion for summary judgment, Calhoun alleged that Preuss had asked him about his retirement plans three times in seven months, that he had been demoted and a younger man promoted to his position, that he had been threatened with a twelve- to fourteen-hour work day and Saturday work if he did not resign, and that he had been informed that no employee had been forced to work these hours after his termination. Appellants claim first that the district court should have struck those paragraphs of Calhoun's affidavit in which he claimed that after his resignation other employees had not

worked the long hours he was threatened with because this information was not within Calhoun's personal knowledge. Without this assertion, appellants claim that the events alleged by Calhoun, even if shown to be true, were not sufficient as a matter of law to satisfy the plaintiff's summary judgment burden of proving constructive discharge.

Appellants rely on cases in which one of these factors standing alone was held an insufficient basis for a finding of constructive discharge: *Alicea Rosado v. Garcia Santiago,* 562 F.2d 114 (1st Cir.1977) (loss of prestige from job transfer insufficient); *Pena v. Brattleboro Retreat,* 702 F.2d 322 (2d Cir.1983) (loss of prestige because of particularly precipitious replacement by trainee insufficient); *Vaughn v. Pool Offshore Co.,* 683 F.2d 922 (5th Cir.1982) (pranks, tricks, heavy-handed humor, and being required to work two consecutive hitches not sufficient).

[2] Appellants' theory is that since each isolated incident cannot as a matter of law suffice for a constructive discharge, all of them together must also fail to do so. The fallacy in this "divide and conquer" approach ***563** is that these events must be viewed as part of a single behavior pattern by appellants. Even were we to omit the allegations concerning the hours worked by others after Calhoun was terminated, the other events taken together compare favorably enough with fact patterns in successful age discrimination cases so as to make a grant of summary judgment improper. *See Cockrell v. Boise Cascade Corp.,* 781 F.2d 173 (10th Cir.1986) (choice of transfer to lower paying job or resignation sufficient); *Williams v. Caterpillar Tractor Co.,* 770 F.2d 47 (6th Cir.1985) (demotion without warning or reprimand enough); *Buckley v. Hospital Corporation of America, Inc.,* 758 F.2d 1525 (11th Cir.1985) (several inquiries about retirement plans along with humiliating demotion, even with same pay and benefits, sufficient). In this case, there were repeated inquiries about resignation, demotion of the plaintiff, promotion of a younger person and the threat of onerous working hours if no resignation. We cannot say as a matter of law that these events viewed as a whole could not be sufficient to constitute constructive discharge.

Directed Verdict

[3] When deciding whether to grant a directed verdict motion, the trial court must look at the facts in a light most favorable to the nonmoving party and, if any set of facts could result in that party's victory, the court must deny the motion. "In doing so, we must recognize that it is for jurors, not judges, to weigh the evidence and determine the credibility of witnesses." *Insurance Co. of North America v. Musa,* 785 F.2d 370, 372 (1st Cir.1986). The facts viewed in the light most favorable to Calhoun are:

1. Calhoun always received good work ratings and high pay raises until Preuss arrived;

2. Cleveland Twist Drill wanted to reduce its work force, preferably by retiring older employees;

3. Calhoun was asked three times in seven months whether he wished to retire, despite having made it clear the first time that he would not retire until he was sixty-five;

4. In an effort to remove Calhoun after he refused to retire, he was demoted, reprimanded for doing something he had done before without sanction, excluded from training sessions, and threatened with a drastic increase in working hours;

5. Calhoun was demoted from being in charge of the department he had run for fourteen years and was put under two people he had trained;

6. No specific criticism of Calhoun's work was ever made; and

7. After his termination, Calhoun was told by a former assistant who had taken over Calhoun's duties that he was not working any more hours than he ever had.

This set of facts was clearly sufficient for a jury to find that a reasonable person in Calhoun's shoes would have felt that his services were no longer desired.

Judgment N.O.V.

We have stated that

> [t]he standard for granting judgment n.o.v. in this circuit is well settled. Such a motion should only be granted upon a determination that the evidence could lead reasonable [persons] ... to but one conclusion, a determination made without evaluating the credibility of witnesses or the weight of the evidence at trial.

Hubbard v. Faros Fisheries, Inc., 626 F.2d 196, 199 (1st Cir.1980). The testimony of Sabatos was to the effect that he had more formal engineering education than Calhoun, that he had some special expertise in a new product line being produced at the plant and that he generally worked a twelve- to fourteen-hour day. Cross-examination brought out that Sabatos' expertise was in a product that accounted

for no more than 10–20% of the factory's output. Calhoun's expertise, on the other hand, related to the product that accounted for 80–90% of the factory's output. Sabatos also testified that Combis, the man who told Calhoun he was working the same ***564** hours as before, had essentially taken over Calhoun's duties. Preuss' testimony focused upon the difficult financial position of the factory and his attempts to improve it. He testified that the company had less work than the staffing level could justify and that his first move was to reduce the staff. He also testified that the plant was having problems producing a quality product on time and that he thought Sabatos was simply a better man for the job. Cross-examination brought out that manufacturing deadlines did not fall within Calhoun's department, but within the responsibility of the Production Department. Preuss also testified that he did not want Calhoun to leave, but was simply trying to find out if he had any retirement plans before laying off a more junior employee.

[4] While appellants' explanation of their action is credible, a reasonable jury could have found that the facts amounted to a constructive discharge. Appellants offered very little evidence to justify Calhoun's demotion as the result of inadequate performance and the repeated retirement inquiries could be interpreted as harassment or at least a broad hint that Calhoun should retire, especially since he had expressed a clear intention not to retire at earlier meetings. Finally, the threat of an increased work day could be seen as a clear message that the company was prepared to make Calhoun's life more and more miserable as he continued to refuse to retire, especially when there was no evidence offered to show that Calhoun had to work long hours to get his job done. The district court did not err in denying appellants' motion for a judgment n.o.v.

[5] Appellants' final claim of error is the district court's failure to give an "anticorporate bias" jury instruction. Appellants submitted such an instruction[2] to the court prior to the charge and properly objected to the court's failure to so instruct. Appellants argue that such an instruction was made necessary by the anticorporate language used by plaintiff's counsel during the closing: "they squeeze the corporate claws around his neck until he has no choice but to say, 'Well, I will retire,' " and "[s]lowly, Bob Calhoun could feel the claw of the company clutching at his neck." The district court instructed the jury that "[b]ias, prejudice, preconceived notions have no place in a jury's deliberations" and "[y]ou are to perform your duty without any bias or prejudice as to either party."

[6] "The purpose of jury instructions is to advise the jury on the proper legal standards to be applied in determining issues of fact as to the case before them." *Harrington v. United States*, 504 F.2d 1306, 1317 (1st Cir.1974). Beyond that, the district court's choice of jury instructions is a matter of discretion. We see no abuse of discretion in the district court's decision not to give the requested instruction. The court admonished the jury twice to avoid bias or prejudice and we believe that was sufficient under the circumstances. Plaintiff's metaphorical-alliterative reference to "corporate claws" seems to us to be within the normal bounds of creative advocacy. It did not approach the appeal to bias found in *Foster v. Crawford Shipping Co.*, 496 F.2d 788 (3d Cir.1974), where plaintiff's counsel emphasized that the corporation was foreign, it had substantial assets and the plaintiff would be a ward of the state if no award was made.

Affirmed.

Parallel Citations

41 Fair Empl.Prac.Cas. (BNA) 1121, 41 Empl. Prac. Dec. P 36,553

Footnotes

* Of the Fifth Circuit, sitting by designation.

1 Patriot's Day is an indigenous Massachusetts holiday; the Boston Marathon is traditionally run on Patriot's Day.

2 The instruction requested by the appellants was as follows:

> You should not attach any significance to the fact that Mr. Calhoun is an individual while Acme Cleveland and Cleveland Twist Drill are corporations. This case should be considered and decided by you as a case between persons of equal standing in the community. Corporations such as Acme Cleveland and Cleveland Twist Drill are entitled to the same fair trial at your hands as a private individual such as Mr. Calhoun. You should not give any preference to Mr. Calhoun because he is an individual, nor does the mere fact that Mr. Calhoun is an individual make his testimony any more credible than the testimony presented by Acme Cleveland and Cleveland Twist Drill. All persons, including corporations, stand equal before the law and are to be treated as equals in a court of justice.

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225 F.3d 1115
United States Court of Appeals, Ninth Circuit.

Ronald Y. CHUANG and Linda Chuang, Plaintiffs–Appellants,
v.
UNIVERSITY OF CALIFORNIA DAVIS, BOARD OF TRUSTEES; and Fitz–Roy Curry, Defendants–Appellees.

No. 99–15036. | Argued and Submitted March 14, 2000. | Filed Aug. 30, 2000.

Assistant professor of pharmacology and assistant research pharmacologist, both of Chinese origin, brought action against state university under Title VII alleging discrimination based on race and national origin. The United States District Court for the Eastern District of California, David F. Levi, J., entered summary judgment in favor of university. Assistant professor and assistant pharmacologist appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) assistant professor was not required to show that he filed formal application for full-time-equivalent (FTE) position to establish that denial of FTE was adverse employment action; (2) assistant professor's alleged lack of qualifications for certain human genetics program, if proven, did not preclude him from establishing he was qualified for FTE position; (3) alleged forcible relocation of laboratory, if proven, was adverse employment action; (4) assistant professor and assistant pharmacologist failed to establish prima facie claim challenging alleged failure of university officials to respond to grievances regarding misappropriation of research funds; (5) alleged statement by university official, and dean's alleged laughter in response, if proven, constituted direct evidence of race and national origin discrimination; (6) alleged statement by chair of pharmacology department during forcible relocation of laboratory, if proven, constituted direct evidence of discrimination; and (7) post-complaint hires were not relevant to claim challenging denial of FTE position.

Affirmed in part, reversed in part, and remanded.

West Headnotes (29)

[1] Civil Rights
Disparate Treatment

An employee alleging disparate treatment under Title VII must first establish a prima facie case of discrimination by showing that: (1) he or she belongs to a protected class; (2) he or she was qualified for the position; (3) he or she was subject to an adverse employment action; and (4) similarly situated individuals outside the protected class were treated more favorably. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
148 Cases that cite this headnote

[2] Civil Rights
Effect of Prima Facie Case; Shifting Burden

Once an employee establishes a prima facie Title VII claim, the burden of production, but not persuasion, shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
69 Cases that cite this headnote

[3] Civil Rights
Motive or Intent; Pretext

Once an employer articulates some legitimate, nondiscriminatory reason for the action challenged in a Title VII suit, the employee must show that the articulated reason is pretextual either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
226 Cases that cite this headnote

[4] Federal Civil Procedure
Employees and Employment Discrimination, Actions Involving

As a general matter, an employee in a Title VII employment discrimination action need produce very little evidence in order to overcome an employer's motion for summary judgment; this is because the ultimate question is one that can only be resolved through a searching inquiry, one that is most appropriately conducted by a factfinder, upon a full record. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

50 Cases that cite this headnote

[5] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

The requisite degree of proof necessary to establish a prima facie case for Title VII on summary judgment is minimal and does not even need to rise to the level of a preponderance of the evidence. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

28 Cases that cite this headnote

[6] **Civil Rights**
Disparate Treatment

Allegation that three of the seven full-time-equivalent (FTE) positions awarded by state university went to Asian professors was not relevant to prima facie case of assistant professor of Chinese origin challenging denial of FTE position, inasmuch as prima facie case required showing that university treated similarly situated individuals outside his protected class more favorably. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
48 Cases that cite this headnote

[7] **Civil Rights**
Promotion, Demotion, and Transfer

Assistant professor was not required to show that he filed formal application for full-time-equivalent (FTE) position at state university in order to establish that denial of FTE was adverse employment action upon which Title VII claim could be based; assistant professor made several written requests for FTE, university promised him he would receive FTE once one became available, and other faculty members had received FTEs without submitting formal applications. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e–2(a)(1).

[8] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Genuine issue of material fact existed as to whether assistant professor's microbiology research and expertise fell within broad category of "human genetics" and thus qualified him for human genetics program, precluding summary judgment as to whether he was qualified for full-time-equivalent (FTE) position at state university, as required for prima facie Title VII case. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

2 Cases that cite this headnote

[9] **Civil Rights**
Promotion, Demotion, and Transfer

Assistant professor's alleged lack of qualifications for certain human genetics program, if proven, did not preclude him from establishing he was qualified for full-time-equivalent (FTE) position, as required for prima facie Title VII case, inasmuch as he was challenging state university's failure to award him pharmacology department FTE, not simply FTE awarded pursuant to such program. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
1 Cases that cite this headnote

[10] **Civil Rights**
Particular Cases

Alleged forcible relocation of laboratory space occupied by assistant professor of pharmacology and assistant research pharmacologist at state university, if proven, was "adverse employment action" under Title VII, inasmuch as its alleged results included disruption of important, ongoing research projects, loss of experimental subjects, withholding of research grants, new facilities being inadequate for ongoing research, and members of research team quitting because of change in working conditions. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e–2(a)(1).

12 Cases that cite this headnote

[11] **Civil Rights**
Practices Prohibited or Required in General; Elements

The removal of or substantial interference with work facilities important to the performance of an employee's job constitutes a material change in the terms and conditions of employment and thus is an "adverse employment action" under Title VII. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
32 Cases that cite this headnote

[12] **Civil Rights**
Disparate Treatment
Civil Rights
Seniority or Merit System

Assistant professor of pharmacology and assistant research pharmacologist, both of Chinese origin, established more favorable treatment of similarly situated individuals outside their protected classes, as required for prima facie Title VII case of race and national origin discrimination against state university, by providing evidence that they were forced to give up their laboratory space for Caucasian faculty member of junior rank, and that university had never relocated laboratory space of any Caucasian faculty member over a faculty member's objections. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
22 Cases that cite this headnote

[13] **Civil Rights**
Particular Cases

Assistant professor of pharmacology and assistant research pharmacologist, both of Chinese origin, failed to establish prima facie Title VII claim challenging alleged failure of state university officials to respond to grievances regarding misappropriation of research funds, inasmuch as university's alleged failure to inform assistant professor of its findings or resulting disciplinary actions was not adverse employment action, and there was no evidence that non-Asian or non-Chinese complainants had received formal responses in similar circumstances. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
3 Cases that cite this headnote

[14] **Civil Rights**
Particular Cases

State university articulated legitimate, nondiscriminatory reason in Title VII action for denying assistant professor full-time-equivalent (FTE) position by stating that because he had full-time position, his position was not in jeopardy, and dean was prepared to pay for his base salary if need arose. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[15] **Civil Rights**
Particular Cases

State university articulated legitimate,

nondiscriminatory reason in Title VII action for forcibly relocating assistant professor's laboratory by stating that relocation was required to accommodate human genetics program. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
3 Cases that cite this headnote

[16] **Civil Rights**
Motive or Intent; Pretext

A Title VII plaintiff can prove pretext in two ways: (1) indirectly, by showing that the employer's proffered explanation is unworthy of credence because it is internally inconsistent or otherwise not believable, or (2) directly, by showing that unlawful discrimination more likely motivated the employer. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
236 Cases that cite this headnote

[17] **Civil Rights**
Weight and Sufficiency of Evidence
Federal Civil Procedure
Employees and Employment Discrimination, Actions Involving

The direct and indirect approaches to proving pretext in a Title VII action are not exclusive; a combination of the two kinds of evidence may in some cases serve to establish pretext so as to make summary judgment improper. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

19 Cases that cite this headnote

[18] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

A Title VII plaintiff alleging disparate treatment can survive summary judgment without producing any evidence of discrimination beyond that constituting his or her prima facie case, if that evidence raises a genuine issue of material fact regarding the truth of the employer's proffered reasons for its adverse employment action. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

93 Cases that cite this headnote

[19] **Civil Rights**
Weight and Sufficiency of Evidence

While a Title VII plaintiff always retains the burden of persuasion, he or she does not necessarily have to introduce additional, independent evidence of discrimination at the pretext stage. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
2 Cases that cite this headnote

[20] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Genuine issues of material fact existed as to whether state university's proffered explanations for denying assistant professor full-time-equivalent (FTE) position and forcibly relocating his laboratory, i.e., that he had full-time position that was not in jeopardy and that laboratory space was needed for human genetics program, were pretextual, precluding summary judgment in Title VII national origin and race discrimination case. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

4 Cases that cite this headnote

[21] **Civil Rights**
Weight and Sufficiency of Evidence

The principle that the same evidence may be used at various stages of a court's analysis of a Title

VII action applies equally to the use of such evidence with respect to various claims of discrimination. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[22] **Civil Rights**
Weight and Sufficiency of Evidence
Federal Civil Procedure
Employees and Employment Discrimination, Actions Involving

At the summary judgment stage of a Title VII action, as well as at trial, any form of evidence of discriminatory treatment that is otherwise admissible may be used to support any allegation of discrimination, whether or not there is a direct relationship between the various claims involved. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

1 Cases that cite this headnote

[23] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Direct evidence of pretext does not have to be specific and substantial for an employee to withstand summary judgment in a Title VII action. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

1 Cases that cite this headnote

[24] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

A Title VII plaintiff is required to produce very little direct evidence of an employer's discriminatory intent to move past summary judgment. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

19 Cases that cite this headnote

[25] **Civil Rights**
Weight and Sufficiency of Evidence

Alleged statement by state university official that "two Chinks" in the pharmacology department were "more than enough," and dean's alleged laughter in response, if proven, constituted direct evidence of race and national origin discrimination in Title VII action brought by assistant professor of Chinese origin. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
8 Cases that cite this headnote

[26] **Civil Rights**
Weight and Sufficiency of Evidence

Alleged statement by chair of state university's pharmacology department during forcible relocation of laboratory operated by assistant professor of Chinese origin, that assistant professor "should pray to your Buddha for help," if proven, constituted direct evidence of race and national origin discrimination in Title VII action. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
1 Cases that cite this headnote

[27] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

It is not the province of a court to spin evidence in an employer's favor when evaluating its motion for summary judgment in a Title VII action; to the contrary, all inferences must be drawn in favor of the non-moving party. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

5 Cases that cite this headnote

[28] **Civil Rights**
Practices Prohibited or Required in General; Elements

An employer's favorable treatment of "Asian" employees does not answer a Title VII claim of discrimination based on national origin. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[29] **Civil Rights**
Hiring

Alleged hiring of Asian professors to fill three of seven full-time-equivalent (FTE) state university positions was not relevant to Title VII claim by assistant professor of Chinese origin challenging denial of FTE position, where such hiring occurred after assistant professor filed his complaint. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Attorneys and Law Firms

***1119** Bradley G. Booth, Booth & Finch, Sacramento, California, for the plaintiffs-appellants.

Dennis C. Huie, Porter, Scott, Weiberg & Delehant, Sacramento, California, for the defendants-appellees.

Appeal from the United States District Court for the Eastern District of California; David F. Levi, District Judge, Presiding, D.C. No. CV–97–00613–DFL/PAN.

Before: POLITZ,[1]REINHARDT, HAWKINS, Circuit Judges.

Opinion

REINHARDT, Circuit Judge:

Dr. Ronald Y. Chuang and Dr. Linda Chuang contend that officials at the University of California, Davis ("Davis") discriminated against them on the basis of their race (Asian) and national origin (Chinese), in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*[2] The Chuangs allege that they suffered discrimination as a result of: (1) Davis's failure and refusal to provide Dr. Ronald Chuang with a promised tenure position; (2) Davis's forcible relocation of the Chuangs' laboratory during an ongoing research program sponsored by the National Institute of Health ("NIH"); and (3) Davis's failure to respond to Dr. Ronald Chuang's complaints regarding the misappropriation of some of his research funds. ***1120** The district court granted Davis summary judgment on all three claims. We reverse on the first two and remand for further proceedings.

I. BACKGROUND[3]

Dr. Ronald Chuang is a microbiologist with a worldwide reputation in his area of expertise. He has conducted important research on the interaction between drug abuse and AIDS, including a seminal study on the effect of morphine on the simian immunodeficiency virus, an important model for AIDS research. He has published his findings in prestigious scientific journals. His research has been continuously supported by grants from the National Institute of Health (NIH). In 1996, when many of the events in this case transpired, his research program was being funded by an extraordinary $1.7 million grant from the NIH and other external sources.

The School of Medicine at Davis is divided into two parts: Clinical and Basic Sciences. The Basic Sciences division consists of five departments: pharmacology, biological chemistry, physiology, cell biology and human anatomy, and medical microbiology.

In 1982, the School of Medicine hired Dr. Chuang as an assistant professor of pharmacology and Dr. Linda Chuang, his wife, as an assistant research pharmacologist.[4] The Chuangs have long collaborated on various research programs. The Chuangs joined the pharmacology department at Davis because they had enjoyed their graduate school experience there and wanted to contribute to the university's educational mission. In choosing Davis, Dr. Chuang turned down an offer for a tenure-track position at the leading pharmacology department in the country, at Yale University.

A. Denial of FTE Position

When Dr. Chuang joined Davis, he was appointed as an assistant "in-residence" professor. Professors in residence

are responsible for funding most of their salaries and research through outside grants. By contrast, full-time-equivalent (FTE) professors—*i.e.,* tenured faculty—have their salaries funded directly by Davis. When an FTE faculty member in a department retires or resigns, the FTE position is generally returned to the department to be reallocated to someone else. Dr. Chuang, the only full-time faculty member in the pharmacology department who is not Caucasian, is also the only one without an FTE.

Shortly after Dr. Chuang joined the department, Dr. Larry Stark, then the department chairman, supported Dr. Chuang for a five-year NIH Research Career Development Award (RCDA), with the understanding that if the prestigious award were granted, Dr. Chuang would receive an FTE position upon its completion. Dr. Chuang received the award, completed it in 1989, but never received an FTE.

In a letter dated April 26, 1988, Chairman Stark informed Dr. Chuang that School of Medicine Dean Hibbard Williams wanted to keep him on the faculty, but that no FTE was available at the time and Davis could not provide him one until a resignation or retirement occurred. In a memorandum dated April 1988, Chairman Stark told an assistant dean that "the School has committed itself to finding [Dr. Chuang] a permanent FTE position in the Department." The memorandum described Dr. Chuang's promotions within the department to the level of associate professor and concluded that in light of "recent court decisions ... these facts also argue strongly for planning an FTE position for Dr. Chuang."

***1121** There have been five retirements in the pharmacology department since 1989. Nevertheless, Dr. Chuang has not received an FTE.

The Executive Committee is a supervisory and policymaking body of the Davis School of Medicine. At a meeting of this committee in 1989, Professor Wallace Winters asked about a Chinese–American professor (not Dr. Chuang) whom the faculty of the pharmacology department had previously and unanimously asked the administration to pursue as a candidate for department chairman. The administration had never contacted this candidate, and Dean Williams had not responded to the faculty's request. According to Professor Winters, Dr. Carroll Cross, sitting next to the dean, remarked that "two Chinks" in the department were more than enough; in response, Dean Williams laughed.

In 1989 and 1990, Davis hired two Caucasian professors as FTEs in the pharmacology department. The second of these two professors, Dr. Michael Hanley, a male Caucasian with no active NIH grants, was hired as a "Targets of Opportunity for Diversity" appointment. The "Targets of Opportunity for Diversity" program was designed by the University of California to recruit minority and women faculty. It provided a special exemption by which a department could forgo the regular full candidate search for an open position.5 Through these hires, the already overwhelmingly white pharmacology department became more so.

Several more FTEs became available to Dean Williams, but he never used them. Two and a half FTE positions were available in the pharmacology department due to retirements. When Dean Gerald Lazarus took over in 1992, he gave three FTEs to the new Rowe Program (described *infra*); four FTEs to the Basic Sciences division for recruitment purposes; and two FTEs to the Basic Sciences division for "compelling educational needs, *retention* or requirements of the Associate Dean for Research" (emphasis added). None of these FTEs went to Dr. Chuang, despite the earlier assurances he had received.

After the Chuangs filed their complaint in district court in 1997, the Basic Sciences division filled a number of FTE positions. Three were given to Asian professors, but not to Dr. Chuang.

B. Forcible Relocation

When the Chuangs joined the faculty in 1982, they were assigned laboratory space in Tupper Hall for their exclusive use. Dr. Gary Henderson, a Caucasian faculty member, refused to remove equipment and materials that he was storing there. In spite of the requests of the Chuangs and the department chairman, Dr. Henderson did not remove the equipment and materials until approximately seven years later. He was not forcibly relocated.

In 1990, when the department made its "diversity"-based hire of Dr. Hanley, Dean Williams asked the Chuangs to give Dr. Hanley two laboratory rooms that they were using for ongoing research. At the time, most of the other faculty members were using their laboratory space for storage purposes; Dr. Chuang was the only faculty member in the pharmacology department conducting active research. Although Dean Williams assured the Chuangs that this arrangement would be temporary, lasting approximately 13–18 months, the rooms were never returned. The Chuangs had to borrow laboratories from other faculty members to continue their research. They relocated their equipment and research in borrowed spaces five times.

Upon becoming dean of the School of Medicine, Dr. Lazarus decided to launch the "Rowe Program," a program

in human genetics. The program required 5000 square feet of space. Davis officials initially designated space in Briggs Hall for ***1122** this program. They contend, however, that Dr. Michael Seldin, the professor who was to be hired as the Rowe Chair, conditioned his acceptance on receiving the space adjacent to the department of biological sciences on the fourth floor of Tupper Hall—the space occupied by the pharmacology department. In his deposition, Dr. Seldin denied that he had demanded this space.

In open meetings in December 1995, Associate Dean Fitz–Roy Curry assured the Basic Sciences division faculty that no faculty member with an active research program would be affected by the allocation of space for the Rowe Program. Then, on January 29, 1996, Dr. Mannfred Hollinger, the new chairman of the pharmacology department, informed the Chuangs that the department would be moved from the fourth floor to the basement of Tupper Hall. If the Chuangs refused to move out, Hollinger said, the administration would change the locks on their doors. Dr. Tom Jue, a faculty member in the biological chemistry department who had borrowed laboratory space in the pharmacology department, was also told to relocate. Like the Chuangs, Dr. Jue was Chinese–American and had an active research program funded by the NIH. Most of the other pharmacology laboratory rooms on the fourth floor were not in use; they were reserved for "future pharmacologists" or new faculty members not yet identified.6 The administration did not require Dr. Hanley—the Caucasian faculty member who was using the two rooms from the Chuangs' laboratory, who had no active NIH research grants, and who had since switched to a different department—to relocate. No Caucasian faculty member with active research was required to relocate.

The Chuangs protested the relocation of their laboratory space, but to no avail.7 Chairman Hollinger responded to their protests in a hostile manner. He told the Chuangs that if they did not comply, "worse things" than the discontinuation of their research would happen to them; that "when all the shooting is done, there will surely be a casualty"; and that the administration would "physically throw [them] out of the laboratory by force" if necessary. On April 18, 1996, the move of their laboratory began. Members of the dean's office, led by Dr. Ted Wandzilak, began packing and moving the Chuangs' laboratory without their consent, mishandling and damaging expensive equipment and hazardous materials. Dr. Wandzilak admitted to the Chuangs that the administration was acting wrongly, but said that if they challenged the eviction on legal grounds, it would take a long time for the matter to be resolved. On May 6, 1996, Dr. Hollinger observed the relocation process and told the Chuangs, "You should pray to your Buddha for help."

The Chuangs' equipment and materials were crammed into the basement laboratory room that they had been assigned—still occupied by other faculty—with the overflow put in another room. The locks to their fourth-floor laboratory were changed. In declarations submitted below, several Davis faculty members stated in the strongest of terms that the forcible relocation of a researcher's laboratory was unheard of. Several Caucasian faculty members ***1123** had, in 1996 and earlier, protested the relocation of their laboratory space, but Davis had never evicted them or removed their equipment. Furthermore, an expert on NIH research grants stated that the forcible relocation of the Chuangs' laboratory violated not only Davis's commitment to Dr. Chuang, but also its commitment to the federal agency itself.

Davis's relocation of the Chuangs' laboratory had a calamitous effect on their research programs. The Chuangs' overall research space was significantly reduced. The basement of Tupper Hall was not designed for molecular biology, Dr. Chuang's main field of research. The Chuangs' laboratory rooms and offices are now located on different floors (the fourth floor and the basement), a fact which not only complicates the scientists' work, but also compromises experimental designs due to the safety rules and regulations of the Center for Disease Control and the university itself. The Chuangs lack access to a cold room and other critical facilities. As a result of the relocation, a technician, graduate student, and undergraduate student quit Dr. Chuang's research program, and he has found it difficult to hire qualified replacements. Scheduled experiments were delayed. A colony of monkeys, to be used in a research project, grew too much in the interim and had to be replaced. The NIH withheld research grants on a particular project for eight months, and the Chuangs could not obtain supplemental grants, which would otherwise have been available to them, because they no longer had sufficient laboratory space. Another $75,000 grant was lost entirely.

C. Investigation of Misappropriated Funds

In June 1994 about $8,000 was misappropriated from Dr. Chūang's NIH research account and diverted to the accounts of the pharmacology department and its chairman. Dr. Chuang made repeated attempts to have the matter investigated by Davis's internal audit office, and complained in writing to various administration officials in 1995 and 1996. The associate director of the internal audit office investigated Dr. Chuang's complaints, provided a written report to the provost, and told Dr. Chuang that the provost would contact him with the findings. The provost did not do so, however, and Dr. Chuang never received any formal response from Davis. In a declaration submitted

below, the associate director of the internal audit office asserted that disciplinary actions were taken in response to Dr. Chuang's complaint, but that Dr. Chuang could not be informed of these actions "because of privacy concerns." The internal audit office was itself unable to respond formally to Dr. Chuang's complaint "because of workload."

D. Proceedings Below

On July 12, 1996, the Chuangs filed a complaint with the Equal Employment Opportunity Commission (EEOC). In 1997 they received a notice of right to sue and filed a Title VII lawsuit, alleging *inter alia* discrimination on the basis of race and national origin, in federal district court. Davis filed a motion for summary judgment; the district court granted it; and the Chuangs filed this appeal.

II. ANALYSIS

A. Legal Framework

[1] [2] [3] The parties agree that the applicable legal framework for considering the summary judgment motion in the instant case is that established by *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Under *McDonnell Douglas,* a plaintiff alleging disparate treatment under Title VII must first establish a prima facie case of discrimination. *Id.* at 802, 93 S.Ct. 1817. Specifically, the plaintiff must show that (1) he belongs to a protected class; (2) he was qualified for the position; (3) he was subject to an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably. *Id.* The burden of production, but not persuasion, then shifts to the employer to articulate some legitimate, nondiscriminatory ***1124** reason for the challenged action. *Id.* If the employer does so, the plaintiff must show that the articulated reason is pretextual "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

[4] As a general matter, the plaintiff in an employment discrimination action need produce very little evidence in order to overcome an employer's motion for summary judgment. This is because "the ultimate question is one that can only be resolved through a searching inquiry—one that is most appropriately conducted by a factfinder, upon a full record." *Schnidrig v. Columbia Mach., Inc.,* 80 F.3d 1406, 1410 (9th Cir.1996) (citations and internal quotation marks omitted). Here, contrary to Federal Rule of Civil Procedure 56, the district court did not evaluate the facts in the light most favorable to the Chuangs, but instead resolved material facts that were disputed and disregarded other important evidence. As we will explain, the record supports a finding of illegal discrimination by Davis on two of the Chuangs' claims and warrants a resolution by trial on those claims.

B. Prima Facie Case

[5] Under the *McDonnell Douglas* framework, "[t]he requisite degree of proof necessary to establish a prima facie case for Title VII ... on summary judgment is minimal and does not even need to rise to the level of a preponderance of the evidence." *Wallis v. J.R. Simplot Co.,* 26 F.3d 885, 889 (9th Cir.1994) (citation omitted); *accord Godwin v. Hunt Wesson, Inc.,* 150 F.3d 1217, 1220 (9th Cir.1998).

1. Denial of FTE Position

[6] Dr. Chuang contends that he was unfairly denied a promised FTE position because of his race and/or national origin. Davis argues that Dr. Chuang failed to establish a prima facie case because: (1) he did not apply for the FTEs that became available; and (2) he was not qualified to receive them.[8] Davis does not challenge the other elements of the prima facie case.

[7] With regard to Davis's first objection, the university contends that because Dr. Chuang did not apply for the FTEs, the failure to grant him such status did not constitute an adverse employment action. The record shows, however, that Dr. Chuang made several written requests for an FTE. Both the department chairman and the dean promised him that he *would* receive an FTE once one became available. Other faculty members have received FTEs without submitting formal applications. One individual, for example, received an FTE without ever applying for one, partly as an incentive for recruiting her husband, Dr. Seldin, to the school. Furthermore, Dr. Chuang had completed a prestigious RCDA grant in 1989. After a different professor at Davis, Dr. Margaret Meyer, had completed an RCDA grant, the university had considered itself compelled under its terms to award her an FTE.[9] Dr. ***1125** Chuang's grant contained the same terms, but Davis did not award an FTE to him. Each of these points supports a finding that any failure by Dr. Chuang to file a formal application as and when individual FTEs became available was irrelevant, and that the filing of such formal applications was not necessary in order for him to

establish that he was the subject of an adverse employment action.

[8] [9] As for Dr. Chuang's qualifications, the district court concluded that Dr. Chuang had failed to establish that he was qualified for the Rowe Program, the School of Medicine's new program in human genetics. This analysis is deficient in several respects. First, there is at least a genuine dispute of material fact as to whether Dr. Chuang's microbiology research and expertise fell within the broad category of "human genetics" and thus qualified him on that basis. Second, at least one individual without experience in human genetics, Dr. Seldin's wife, received a Rowe Program FTE. Third, and most important, Dr. Chuang challenges Davis's failure to award him a pharmacology department FTE, not simply an FTE awarded pursuant to the Rowe Program. Davis could, for instance, have given to Dr. Chuang directly one of the three FTEs that it instead assigned to the Rowe Program in 1992. Or it could have given him one of the other FTEs that became available, such as the FTEs that went to Caucasian individuals in the pharmacology department in 1989 and 1990. The chairman and dean had promised him an FTE at least since 1988, and five FTEs became available in the pharmacology department between then and 1996. On the basis of the record at summary judgment, Dr. Chuang was qualified for at least some, and possibly all, of these FTEs.

In view of the above, we conclude that Dr. Chuang succeeded in establishing a prima facie case of discrimination with regard to his failure to receive an FTE.

2. Forcible Relocation

The Chuangs also established a prima facie case with respect to the forcible relocation of their laboratory space. Here, consistent with the district court's decision, Davis contests the third and fourth elements of the *McDonnell Douglas* test. It argues that the forced relocation did not amount to an adverse employment action, and that the Chuangs did not show that they were treated differently than other employees.

[10] [11] Viewing the evidence favorably to the Chuangs, the relocation of their laboratory space unquestionably qualifies as an adverse employment action. Title VII provides that it is unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e–2(a)(1). The Supreme Court has held that "this not only covers 'terms' and 'conditions' in the narrow sense, but 'evinces a congressional intent to strike at the entire spectrum of disparate treatment ... in employment.' " *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)). *Cf. Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir.2000) (holding that for purposes of a Title VII retaliation claim, "an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity"). Here, the forcible relocation of the Chuangs' laboratory disrupted important, ongoing research projects. Due to the delay, experimental subjects were lost and research grants were withheld. The Chuangs lost other grants entirely. Both scientists rely on grants for their salary. During the move, fragile, expensive equipment was damaged and misplaced. The Chuangs were moved to a location with qualities—*e.g.*, split-level assignment, reduced space, lack of cold storage—totally inadequate for their ongoing research. Members of Dr. ***1126** Chuang's research team quit because of the change in working conditions. Several Davis professors declared that the involuntary move of Dr. Chuang's laboratory was unprecedented and certain to hinder his research. It also violated the university's commitments to the NIH. The forcible relocation involved far more than, as the district court characterized it, "a host of annoyances." The removal of or substantial interference with work facilities important to the performance of the job constitutes a material change in the terms and conditions of a person's employment. Assuming the truth of the allegations, the move of the Chuangs' laboratory more than qualified as an adverse employment action.

[12] The Chuangs also satisfy the fourth element of the *McDonnell Douglas* test, the more favorable treatment of similarly situated individuals outside their protected classes, in at least two different ways. They were forced to give up their laboratory space for a Caucasian faculty member of junior rank, Dr. Seldin. Furthermore, Davis has never relocated the laboratory space of any Caucasian faculty member over the faculty member's objections.[10]

In view of the above, a prima facie case exists as to the forcible relocation also.

3. Investigation of Misappropriated Funds

[13] The Chuangs did not, however, establish a prima facie case on their claim challenging the failure of Davis officials to respond to his grievances regarding the misappropriation of his research funds. The lack of a response does not amount to an adverse employment action. The record shows that Davis officials investigated Dr. Chuang's complaint and took unspecified disciplinary actions. While the university's failure to inform Dr. Chuang of its findings or resulting disciplinary actions was certainly irritating and perhaps unjustified, it did not

materially affect the compensation, terms, conditions, or privileges of the Chuangs' employment. Nor did the Chuangs present evidence showing that non-Asian or non-Chinese complainants have received formal responses in similar circumstances.11 We therefore affirm the district court's award of summary judgment on this claim.

C. Davis's Nondiscriminatory Reasons and Pretext Analysis

[14] [15] Because the Chuangs established a prima facie case for the first two claims, the burden of production shifts to Davis to articulate a nondiscriminatory reason for each adverse employment action. *St. Mary's Honor Center,* 509 U.S. at 506–07, 113 S.Ct. 2742; *McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. 1817. Davis contends that it did not give Dr. Chuang an FTE because he had a full-time position, his position was not in jeopardy, and the dean was prepared to pay for his base salary if the need arose. It also maintains that the forcible relocation of the Chuangs' laboratory was required to accommodate the Rowe Program.

By offering these explanations, Davis has articulated legitimate, nondiscriminatory reasons for its actions. *McDonnell Douglas* requires the Chuangs in turn to raise a genuine factual question whether, viewing the evidence in the light most favorable to them, Davis's reasons are pretextual.

***1127 [16] [17]** We have stated that a plaintiff can prove pretext in two ways: (1) indirectly, by showing that the employer's proffered explanation is "unworthy of credence" because it is internally inconsistent or otherwise not believable, or (2) directly, by showing that unlawful discrimination more likely motivated the employer. *Godwin,* 150 F.3d at 1220–22. These two approaches are not exclusive; a combination of the two kinds of evidence may in some cases serve to establish pretext so as to make summary judgment improper. In this case, while the indirect evidence and direct evidence are independently sufficient to allow the Chuangs to proceed to trial, it is the cumulative evidence to which a court ultimately looks.

1. Indirect Evidence

[18] [19] It is not quite accurate to say that at this point the burden of *production* shifts back to the Chuangs. As the Supreme Court recently reaffirmed, a disparate treatment plaintiff can survive summary judgment without producing any evidence of discrimination beyond that constituting his prima facie case, if that evidence raises a genuine issue of material fact regarding the truth of the employer's proffered reasons. *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, ——, 120 S.Ct. 2097, 2108, 147 L.Ed.2d 105 (2000) (holding that if factfinder rejects employer's proffered nondiscriminatory reasons as unbelievable, it may infer "the ultimate fact of intentional discrimination" without additional proof of discrimination); *see also St. Mary's Honor Center,* 509 U.S. at 511, 113 S.Ct. 2742. While the plaintiff always retains the burden of persuasion, *Reeves,* 530 U.S. at ——, 120 S.Ct. at 2106, he does not necessarily have to introduce "additional, independent evidence of discrimination" at the pretext stage, *id.* at 2109. *Accord Schnidrig,* 80 F.3d at 1410–11; *Washington,* 10 F.3d at 1433; *Sischo–Nownejad v. Merced Community College Dist.,* 934 F.2d 1104, 1111 (9th Cir.1991); *Lowe v. City of Monrovia,* 775 F.2d 998, 1008–09 (9th Cir.1985), *amended by* 784 F.2d 1407 (1986).

[20] Here, we conclude that, with respect to Dr. Chuang's FTE claim, the evidence constituting his prima facie case is sufficiently strong to raise a genuine issue of material fact regarding the truth of Davis's proffered nondiscriminatory reasons. Dr. Chuang's qualifications as a microbiologist and academic are extraordinary: he has developed a reputation as a leading AIDS researcher, published in prestigious journals, and received large amounts of funding from the NIH. Yet he is the *only* full-time faculty member in his department at Davis who has not received an FTE. It also happens that he is the *only* non-Caucasian. He was promised an FTE, but whenever one became available, it was assigned to someone else. Given this evidence, a factfinder could well decide to disbelieve Davis's explanation that (aside from his purported lack of qualifications) it did not offer an FTE to Dr. Chuang because his position was never in jeopardy (a fact due, of course, to the high level of funding he had obtained).12

[21] [22] Similarly, we hold that the Chuangs made a sufficiently strong showing in their prima facie case to raise a genuine issue of material fact as to whether Davis's proffered explanation for the forcible relocation of their laboratory is pretextual. Davis contends that Dr. Seldin, the presumptive Rowe Chair, demanded the precise space occupied by the Chuangs on the fourth floor of Tupper Hall, the space adjacent to that occupied by the department of biological chemistry. Dr. Seldin, however, denied this contention in his deposition. This is the sort of evidence that could lead a factfinder to disbelieve Davis. The refusal of Dr. Henderson to remove equipment from the Chuangs' ***1128** laboratory, the failure of Dean Williams to return to them the two rooms assigned to Dr. Hanley in 1990, and the extraordinarily hostile manner in which the School of Medicine evicted the Chuangs are additional facts which contribute to establishing a jury issue as to the falsity of Davis's explanation. *See Reeves,* 530 U.S. at ——–——, 120 S.Ct. at 2110–11. In addition, the circumstances

surrounding Davis's failure to give Dr. Chuang the promised FTE may properly be considered in determining whether Davis's explanation regarding the forcible relocation is pretextual. The *Reeves* principle that the same evidence may be used at various stages of a court's analysis applies equally to the use of such evidence with respect to various claims of discrimination. At the summary judgment stage, as well as at trial, any form of evidence of discriminatory treatment that is otherwise admissible may be used to support any allegation of discrimination, whether or not there is a direct relationship between the various claims involved.

2. Direct Evidence

[23] [24] The Chuangs also presented direct evidence of discriminatory motive with respect to both of the claims on which we reverse the grant of summary judgment. In its order, the district court held that direct evidence of pretext had to be specific and substantial. This was error. "With direct evidence, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial." *Blue v. Widnall,* 162 F.3d 541, 546 (9th Cir.1998) (citing *Godwin,* 150 F.3d at 1220–21); *see also Reeves,* 530 U.S. at ——, 120 S.Ct. at 2111 (criticizing lower court for failing to draw all reasonable inferences in favor of plaintiff when analyzing direct evidence of discriminatory animus). The plaintiff is required to produce "very little" direct evidence of the employer's discriminatory intent to move past summary judgment. *Godwin,* 150 F.3d at 1221 (quoting *Lindahl v. Air France,* 930 F.2d 1434, 1438 (9th Cir.1991)); *see also Lowe,* 775 F.2d at 1009.

[25] The Chuangs easily clear this threshold. Two items of direct evidence in this case are particularly significant. First, a member of the Executive Committee, a decisionmaking body for the School of Medicine, Dr. Cross, reportedly stated in a meeting in 1989, just as Dr. Chuang was completing his prestigious five-year NIH Research Career Development Award, that "two Chinks" in the pharmacology department were "more than enough."[13] We need not dwell on the offensiveness of the term used. It is "an egregious and bigoted insult, one that constitutes strong evidence of discriminatory animus on the basis of national origin." *Cf. Cordova,* 124 F.3d at 1149 (discussing allegation that employer referred to another employee as "dumb Mexican"). Dr. Cross's remark establishes discriminatory intent even though it was uttered during consideration of a different Asian–American's potential employment. *Id.* ("[I]f such remarks were indeed made, they could be proof of discrimination against [plaintiff] despite their reference to another agent and their utterance after the hiring decision."). Moreover, it implicates not only the speaker. For purposes of summary judgment, Dean Williams's laughing response to this remark establishes adequate evidence of discriminatory intent on his part also. *Cf. McDonnell Douglas,* 411 U.S. at 804, 93 S.Ct. 1817 (observing that an employer's "reaction" to plaintiff's "legitimate civil rights activities" might be relevant to showing of pretext), *cited in Lowe,* 775 F.2d at 1009; *see also Reeves,* 530 U.S. at ——, 120 S.Ct. at 2111 (rejecting claim that, as a matter of law, discriminatory remarks must be made "in the direct context" of an adverse employment decision).

***1129 [26] [27]** The second item of direct evidence is the statement of Dr. Hollinger, the chairman of the pharmacology department, during the forcible relocation of the Chuangs' laboratory. Having already told the Chuangs that they would be physically thrown out of their laboratory and that "worse things" would happen if they continued their protests, Chairman Hollinger told them on May 6, 1996, during the eviction process, that they "should pray to [their] Buddha for help." The district court opined that this statement was "apparently intended as a humorous comment on his and Dr. Chuang's joint plight in the laboratory relocation controversy in which Dr. Hollinger was Dr. Chuang's ally in opposing the move." In drawing this inference in Davis's favor, the district court erred. First, the comment was not humorous. Second, Dr. Hollinger did not share the Chuangs' plight; the record supports a finding that as department chairman, he was instrumental in creating it. (It also indicates that department chairmen play a significant role in hiring faculty and awarding FTEs.) It is not the province of a court to spin such evidence in an employer's favor when evaluating its motion for summary judgment. To the contrary, all inferences must be drawn in favor of the non-moving party. Like the "two Chinks" incident, the admonition of a high-ranking official to an Asian–American employee to "pray to your Buddha" during the time of an adverse employment action is sufficient evidence of discriminatory motive for purposes of *McDonnell Douglas* pretext analysis.

3. Cumulative Evidence

In view of the conclusions we have reached with respect to both the indirect evidence and the direct evidence, there can be no doubt that on the basis of the cumulative evidence, the Chuangs have, for purposes of summary judgment, established pretext on Davis's part.

D. Post–Complaint Hires

Lastly, with respect to Dr. Chuang's claim for denial of an

FTE position, the district court held that he failed to show "differential treatment regarding the denial of an FTE position." Specifically, according to the district judge, Dr. Chuang did not refute Davis's evidence that "of the seven FTEs awarded in the Basic Sciences division of the School of Medicine since 1996, three have gone to Asian professors." Davis cites this fact in its brief, but wisely refrains from relying on it as a basis for affirming the district court's decision.

[28] As an initial matter, the record does not reveal the national origin of these new hires. An employer's favorable treatment of "Asian" employees does not answer a claim of discrimination based on national origin. *See Lam v. University of Hawaii,* 40 F.3d 1551, 1561 n. 16 (9th Cir.1994) ("[I]t is significant that Lam and the Asian male candidate were of different national origins—Lam being Vietnamese–French, the male candidate, Chinese. Lam alleged not only race discrimination but also national origin discrimination, thereby raising this distinction as relevant under Title VII.").

[29] More important, the three Asian professors were hired, according to the Chuangs, long after the Chuangs filed their complaints with the EEOC and their lawsuit in federal court. If accurate, this timing would eliminate any probative value the evidence might otherwise have. "Given the obvious incentive in such circumstances for an employer to take corrective action in an attempt to shield itself from liability, it is clear that nondiscriminatory employer actions occurring subsequent to the filing of a discrimination complaint will rarely even be relevant as circumstantial evidence in favor of the employer." *Lam,* 40 F.3d at 1561 n. 17 (citing *Gonzales v. Police Dep't, City of San Jose,* 901 F.2d 758, 761–62 (9th Cir.1990)). In *Gonzalez* this court reviewed rulings calling into doubt the relevance of an employer's post-complaint promotion of minority employees in cases seeking prospective relief against discriminatory employment practices. 901 F.2d at 762. It then found the ***1130** irrelevance of such evidence "even more apparent" in disparate treatment cases like this one addressing "whether discrimination occurred prior to the commencement of a Title VII action." *Id.* "Curative measures simply do not tend to prove that a prior violation did not occur." *Id.*

Davis's subsequent hiring practices are therefore irrelevant to the question whether Dr. Chuang was subjected to discrimination from 1982 to 1997. On remand, the district court should exclude at trial evidence of Davis's post-complaint hiring of Asian–American professors, unless the university can prove that it made its hiring decisions before it became aware that the Chuangs intended to pursue their complaints.

III. CONCLUSION

For the foregoing reasons, we reverse the district court's grant of summary judgment on Dr. Ronald Chuang's challenge to the denial of his promised FTE position and the Chuangs' challenge to the forcible relocation of their laboratory in 1996.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Parallel Citations

86 Fair Empl.Prac.Cas. (BNA) 1551, 79 Empl. Prac. Dec. P 40,228, 00 Cal. Daily Op. Serv. 7295, 2000 Daily Journal D.A.R. 9673

Footnotes

1 The Honorable Henry A. Politz, Senior United States Circuit Judge for the Fifth Circuit Court of Appeals, sitting by designation.

2 Plaintiffs voluntarily dismissed Dr. Fitz–Roy Curry as a defendant below.

3 Because the plaintiffs appeal from an order granting Davis summary judgment, we set forth the relevant facts in the light most favorable to them. Some of these facts are disputed by Davis.

4 The allegations and claims in this case relate primarily to Dr. Ronald Chuang. For purposes of clarity, we herein refer to him as "Dr. Chuang" and his wife as "Dr. Linda Chuang."

5 Davis argues, not particularly persuasively in light of the materials in the record, that the "Targets of Opportunity for Diversity" program was intended to recruit faculty from outside the university, not qualified minority and women faculty.

6 Even at the time the parties submitted briefs on summary judgment below, there was still enough empty laboratory space on the fourth floor of Tupper Hall for both the Rowe Program and the Chuangs' research needs.

7 The Chuangs made numerous formal and informal complaints with the administration. Their reasons for not wanting to relocate were: (1) the relocation would significantly damage their ongoing research; (2) due to strongly held cultural beliefs, they could not work in the proximity of the morgue, which is located on the basement floor; and (3) the basement is unsafe for Dr. Linda Chuang who often has to work in the laboratory late at night. With respect to the second reason, Associate Dean Curry advised the Chuangs to enter the basement from an entrance away from the morgue, cover their eyes with their hands as they walked past the morgue to their laboratory, and "pretend" that the morgue was not there.

8 The district court also held that Dr. Chuang failed to show "differential treatment regarding the denial of an FTE position" because "of the seven FTEs awarded in the Basic Sciences division of the School of Medicine since 1996, three have gone to Asian professors." This point is not relevant to the prima facie requirement. Under *McDonnell Douglas,* a plaintiff must show that an employer treated similarly situated individuals *outside* the plaintiff's protective class more favorably, not that the employer treated all other members *within* the class less favorably. We address the relevance of these post-complaint hires to the overall disparate treatment inquiry in Section D, *infra.*

9 Davis incorrectly argues that the declaration relating this evidence "lacks foundation, is conclusory, and is hearsay." The statements set forth in Professor Jerold Theis's declaration are based on his personal knowledge of faculty meetings and other events that occurred during his twenty-eight years at the Davis School of Medicine. It is proper evidence under Federal Rule of Civil Procedure 56(e).

10 The Chuangs also argue that no Caucasian faculty member with an ongoing active NIH research program was asked to move during the 1996 relocation. Davis, however, asserts that Dr. Larry Stark also had active ongoing research and was asked to relocate his laboratory space from Tupper Hall. (He did not oppose relocation.) In response, the Chuangs contend that at the time Dr. Stark was not conducting research at Tupper Hall, but at a different laboratory, and that his research involved only a small amount of grant money, not NIH funds. These disputed facts also require resolution by the factfinder at trial.

11 While Dean Lazarus testified in his deposition that complaints of this nature are meticulously investigated, he did not state whether formal responses are always provided.

12 We do not suggest that this is the only indirect evidence that supports this aspect of Dr. Chuang's claim. For example, there is also evidence regarding misuse of the "Targets of Opportunity for Diversity" program to give a Caucasian scientist, but not Dr. Chuang, an FTE position in the otherwise all-white pharmacology department.

13 The fact that this incident was related in the declaration of a faculty member other than Ronald or Linda Chuang strengthens its value as direct evidence of discriminatory intent. *See Cordova,* 124 F.3d at 1149 n. 5; *Schnidrig,* 80 F.3d at 1411.

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299 F.3d 838
United States Court of Appeals, Ninth Circuit.

Catharina F. COSTA, Plaintiff-Appellee,
v.
DESERT PALACE, INC., dba Caesars Palace Hotel & Casino, Defendant-Appellant.

No. 99-15645. | Argued and Submitted March 21, 2002. | Filed Aug. 2, 2002.

Former employee sued former employer for gender discrimination under Title VII. The United States District Court for the District of Nevada, David W. Hagen, J., entered judgment on jury verdict in favor of former employee. Former employer appealed. The Court of Appeals, William W. Schwarzer, Senior District Judge, 268 F.3d 882, vacated judgment. On en banc rehearing, the Court of Appeals, McKeown, Circuit Judge, held that: (1) Title VII imposes no special or heightened evidentiary burden on a plaintiff in a mixed-motive case; (2) District Court did not abuse its discretion in giving mixed-motive instruction: (3) issue whether discrimination was motivating factor in terminating employee was for jury; (4) issue whether employer would have decided to terminate employee even if employee's gender had played no role in termination decision was for jury; and (5) District Court did not abuse its discretion in excluding arbitration decisions.

Affirmed in part; reversed and remanded in part.

Gould, Circuit Judge, dissented and filed opinion in which Kozinski, Fernandez, and Kleinfeld, Circuit Judges, joined.

West Headnotes (47)

[1] **Civil Rights**
Weight and Sufficiency of Evidence

Title VII imposes no special or heightened evidentiary burden on a plaintiff in a mixed-motive case. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
1 Cases that cite this headnote

[2] **Civil Rights**
Employment Practices
Civil Rights
Discrimination by Reason of Race, Color, Ethnicity, or National Origin, in General
Civil Rights
Sex Discrimination in General

An employee makes out a Title VII violation by showing discrimination because of race, sex, or another protected factor. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-2(a)(1).

1 Cases that cite this headnote

[3] **Civil Rights**
Motive or Intent; Pretext

An "unlawful employment practice" prohibited by Title VII encompasses any situation in which a protected characteristic was a motivating factor in an employment action, even if there were other motives. Civil Rights Act of 1964, § 703(a), as amended, 42 U.S.C.A. § 2000e-2(a).

[4] **Civil Rights**
Defenses in General

In a mixed-motive Title VII case, if the employee succeeds in proving only that a protected characteristic was one of several factors motivating the employment action, an employer cannot avoid liability altogether, but instead may assert an affirmative defense to bar certain types of relief by showing the absence of "but for" causation. Civil Rights Act of 1964, §§ 703(m), 706(g)(2)(B), as amended, 42 U.S.C.A. §§ 2000e-2(m), 2000e-5(g)(2)(B).

21 Cases that cite this headnote

[5] **Civil Rights**
Presumptions, Inferences, and Burden of Proof

Amendments to Title VII providing that an unlawful employment practice is established when a protected characteristic is a motivating factor in an employment action, and providing an affirmative defense relative to such situation, did nothing to change the plaintiff's ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff. Civil Rights Act of 1964, §§ 703(m), 706(g)(2)(B), as amended, 42 U.S.C.A. §§ 2000e-2(m), 2000e-5(g)(2)(B).

[6] **Civil Rights**
Weight and Sufficiency of Evidence
Civil Rights
Sex Discrimination

Title VII does not impose a special evidentiary rule on or hurdle for victims of mixed-motive discrimination to prove their case; the inquiry is simply that of any civil case, that is, whether the plaintiff's evidence is sufficient for a rational factfinder to conclude by a preponderance of the evidence that the employer violated the statute, that is, that race, color, religion, sex, or national origin was a motivating factor for any employment practice. Civil Rights Act of 1964, §§ 703(a, m), 706(g)(2)(B), as amended, 42 U.S.C.A. §§ 2000e-2(a, m), 2000e-5(g)(2)(B).

4 Cases that cite this headnote

[7] **Civil Rights**
Weight and Sufficiency of Evidence

Non-circumstantial evidence is not the magical threshold for Title VII liability. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[8] **Civil Rights**
Weight and Sufficiency of Evidence

The plaintiff in any Title VII case may establish a violation through a preponderance of evidence, whether direct or circumstantial, that a protected characteristic played a motivating factor in the employer's decision. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
12 Cases that cite this headnote

[9] **Evidence**
Circumstantial Evidence

In proving a case, circumstantial evidence is weighed on the same scale and laid before the jury in the same manner as direct evidence; in other words, circumstantial evidence is not inherently less probative than direct evidence.

[10] **Courts**
Supreme Court Decisions

It is generally undesirable, where holdings of the Supreme Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code.

1 Cases that cite this headnote

[11] **Civil Rights**
Disparate Treatment

Disparate treatment claims under Title VII require the plaintiff to prove that the employer acted with conscious intent to discriminate. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

11 Cases that cite this headnote

[12] **Civil Rights**
Practices Prohibited or Required in General; Elements

A Title VII plaintiff may establish a prima facie case by showing: (1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
1 Cases that cite this headnote

[13] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

The legal proof structure of the *McDonnell Douglas* prima facie case and burden-shifting paradigm is a tool to assist plaintiffs at the summary judgment stage so that they may reach trial. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

6 Cases that cite this headnote

[14] **Civil Rights**
Effect of Prima Facie Case; Shifting Burden

A Title VII plaintiff may make out a prima facie case, which may be a weak showing, that entitles her to a transitory presumption of discrimination; the burden of production only shifts briefly to the employer to explain why it took the challenged action, if not based on the protected characteristic. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
4 Cases that cite this headnote

[15] **Civil Rights**
Effect of Prima Facie Case; Shifting Burden

Once an employer rebuts the presumption of discrimination created by a prima facie Title VII case, the burden of production shifts back to the plaintiff to introduce evidence from which the factfinder could conclude that the employer's proffered reason was pretextual. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
5 Cases that cite this headnote

[16] **Civil Rights**
Presumptions, Inferences, and Burden of Proof

In a Title VII case, the burden of persuasion always remains with the employee to prove the ultimate Title VII violation, that is, unlawful discrimination. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
4 Cases that cite this headnote

[17] **Civil Rights**
Effect of Prima Facie Case; Shifting Burden
Civil Rights
Weight and Sufficiency of Evidence

Nothing compels the parties to a Title VII action to invoke the *McDonnell Douglas* presumption; evidence in a Title VII action can be in the form of the *McDonnell Douglas* prima facie case, or other sufficient evidence, direct or circumstantial, of discriminatory intent. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
10 Cases that cite this headnote

[18] **Civil Rights**
Effect of Prima Facie Case; Shifting Burden

Although the *McDonnell Douglas* burden-shifting scheme may be used in a Title VII action where a single motive is at issue, this proof scheme is not the exclusive means of proof in such a case; it also might be invoked in cases in which the defendant asserts a "same decision" defense to certain remedies, a circumstance in which mixed motives are at issue. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
3 Cases that cite this headnote

[19] **Civil Rights**
Instructions

Regardless of the method chosen to arrive at trial, it is not normally appropriate to introduce the *McDonnell Douglas* burden-shifting framework to the jury. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
6 Cases that cite this headnote

[20] **Civil Rights**
Effect of Prima Facie Case; Shifting Burden
Civil Rights
Questions of Law or Fact

The presumption of discrimination created by a prima facie Title VII case retains vitality at trial in one limited circumstance, that is, where there is no rebuttal by the employer, but the plaintiff's prima facie case is in factual dispute; the jury then determines whether the prima facie case is established, and, if it is, the jury must find discrimination. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
2 Cases that cite this headnote

[21] **Civil Rights**
Presumptions, Inferences, and Burden of Proof

Once at the trial stage of a Title VII action, the plaintiff is required to put forward evidence of discrimination "because of" a protected characteristic. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[22] **Civil Rights**
Motive or Intent; Pretext
Civil Rights
Pleading

A Title VII case need not be characterized or labeled as a "pretext" or "mixed-motives" case at the outset, inasmuch as the shape will often emerge after discovery or even at trial; similarly, the complaint itself need not contain more than the allegation that the adverse employment action was taken because of a protected characteristic. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
6 Cases that cite this headnote

[23] **Civil Rights**
Instructions

After hearing both parties' evidence at a trial of a Title VII claim, the district court must decide what legal conclusions the evidence could reasonably support and instruct the jury accordingly, and this determination is distinct from the question of whether to invoke the *McDonnell Douglas* presumption; the choice of jury instructions depends simply on a determination of whether the evidence supports a finding that just one, or more than one, factor actually motivated the challenged decision. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
4 Cases that cite this headnote

[24] **Civil Rights**
Instructions

If, based on the evidence presented in a Title VII action, the trial court determines that the only reasonable conclusion a jury could reach is that discriminatory animus is the sole cause for the challenged employment action or that discrimination played no role at all in the

employer's decisionmaking, then the jury should be instructed to determine whether the challenged action was taken "because of" the prohibited reason. Civil Rights Act of 1964, § 703(a), as amended, 42 U.S.C.A. § 2000e-2(a).

2 Cases that cite this headnote

[25] **Civil Rights**
Motive or Intent; Pretext

If, based on the evidence presented in a Title VII action, the trial court determines that the only reasonable conclusion a jury could reach is that discriminatory animus is the sole cause for the challenged employment action or that discrimination played no role at all in the employer's decisionmaking, and the jury determines that the employer acted because of discriminatory intent, the employee prevails and may receive the full remedies available under Title VII. Civil Rights Act of 1964, § 703(a), as amended, 42 U.S.C.A. § 2000e-2(a).

3 Cases that cite this headnote

[26] **Civil Rights**
Motive or Intent; Pretext
Civil Rights
Defenses in General

If, based on the evidence presented in a Title VII action, the trial court determines that the only reasonable conclusion a jury could reach is that discriminatory animus is the sole cause for the challenged employment action or that discrimination played no role at all in the employer's decisionmaking, and the jury determines that the employer did not act because of discriminatory intent, the employer prevails; in such cases the employer does not benefit from the "same decision" defense, which, if successful, significantly limits the employee's remedies. Civil Rights Act of 1964, § 703(a), as amended, 42 U.S.C.A. § 2000e-2(a).

[27] **Civil Rights**
Motive or Intent; Pretext
Civil Rights
Instructions

In Title VII cases in which the evidence could support a finding that discrimination is one of two or more reasons for the challenged decision, at least one of which may be legitimate, the jury should be instructed to determine first whether the discriminatory reason was a motivating factor in the challenged action; if the jury's answer to this question is in the affirmative, then the employer has violated Title VII. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
9 Cases that cite this headnote

[28] **Civil Rights**
Relief
Civil Rights
Monetary Relief; Restitution
Civil Rights
Proceedings, Grounds, and Objections in General

If the jury finds in a Title VII mixed-motives case that the employer has proved the "same decision" affirmative defense by a preponderance of the evidence, the employer will escape the imposition of damages and any order of reinstatement, hiring, promotion, and the like, and is liable solely for attorney fees, declaratory relief, and an order prohibiting future discriminatory actions. Civil Rights Act of 1964, § 706(g)(2)(B), as amended, 42 U.S.C.A. § 2000e-5(g)(2)(B).

[29] **Civil Rights**
Motive or Intent; Pretext
Civil Rights
Weight and Sufficiency of Evidence

Although the employer may be entitled to the "same decision" affirmative defense instruction

in some Title VII cases, and in other cases it may not, the employee's ultimate burden of proof in all cases remains the same: to show by a preponderance of the evidence that the challenged employment decision was "because of" discrimination. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
6 Cases that cite this headnote

[30] **Civil Rights**
Motive or Intent; Pretext

"Single-motive" and "mixed-motive" cases are not fundamentally different categories of cases, and both require the employee to prove discrimination; they simply reflect the type of evidence offered. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
2 Cases that cite this headnote

[31] **Federal Courts**
Nature or Subject-Matter of Issues or Questions
Federal Courts
Conduct of Trial in General

The Court of Appeals generally reviews the formulation of jury instructions for abuse of discretion, but whether an instruction misstates the law is a legal issue reviewed de novo.

2 Cases that cite this headnote

[32] **Federal Courts**
Allowance of Remedy and Matters of Procedure in General

Determination whether evidence could be characterized as establishing multiple motives, thus warranting affirmative defense on part of employer in Title VII action, was evaluation of evidence, warranting review for abuse of discretion.

[33] **Federal Courts**
Instructions

Employer waived objection to form of jury instruction in Title VII action in conceding at trial that it was "a reasonable statement of the mixed motive instruction." Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc.Rule 51, 28 U.S.C.A.

1 Cases that cite this headnote

[34] **Civil Rights**
Instructions

District court did not abuse its discretion in giving mixed-motive instruction in Title VII action; although employee did not dispute many of events that took place, and although employee did not wholly discount that such events may have been part of basis for her discipline and termination, the wide array of discriminatory treatment was sufficient to support conclusion that sex was also motivating factor in decision-making process. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
3 Cases that cite this headnote

[35] **Federal Courts**
Trial De Novo

Court of Appeals would review de novo appellant's challenge to district court's denial of its motion for judgment as matter of law. Fed.Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.

2 Cases that cite this headnote

[36] **Federal Courts**
Verdicts in General
Federal Courts

Rendering Final Judgment on Reversal

The Court of Appeals can overturn a jury's verdict and grant a motion for judgment as a matter of law only if there is no legally sufficient basis for a reasonable jury to find for that party on that issue. Fed.Rules Civ.Proc.Rule 50(a), 28 U.S.C.A.

3 Cases that cite this headnote

[37] **Federal Courts**
Judgment Notwithstanding Verdict

In reviewing a denial of a motion for judgment as a matter of law, the Court of Appeals may not substitute its view of the evidence for that of the jury. Fed.Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.

3 Cases that cite this headnote

[38] **Federal Courts**
Judgment N. O. v
Federal Courts
Weight or Preponderance of Evidence in General
Federal Courts
Credibility of Witnesses in General

In reviewing a denial of a motion for judgment as a matter of law, the Court of Appeals neither makes credibility determinations nor weighs the evidence, and it must draw all inferences in favor of the nonmovant. Fed.Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.

[39] **Federal Courts**
Judgment Notwithstanding Verdict

In reviewing a denial of a motion for judgment as a matter of law, the Court of Appeals is required to disregard all evidence favorable to the moving party that the jury is not required to believe; this high hurdle recognizes that credibility, inferences, and factfinding are the province of the jury, not the Court. Fed.Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.

7 Cases that cite this headnote

[40] **Civil Rights**
Questions of Law or Fact

Issue whether intentional discrimination on basis of sex was motivating factor in subjecting employee to termination and other adverse actions was for jury in Title VII action; linking differential treatment to employee's sex was not difficult given that she was the only woman in her unit, employee was terminated for physical altercation with male coemployee who netted only suspension, and employee was told she did not deserve overtime because she did not have family to support. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
1 Cases that cite this headnote

[41] **Civil Rights**
Hostile Environment; Severity, Pervasiveness, and Frequency
Civil Rights
Hostile Environment; Severity, Pervasiveness, and Frequency

For purposes of Title VII, the prevalence of race or sex-based slurs does not excuse them. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
4 Cases that cite this headnote

[42] **Civil Rights**
Sex Discrimination

When abuse directed at women centers on the fact that they are females, a jury may infer discrimination. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[43] **Civil Rights**
Questions of Law or Fact

Issue whether employer would have decided to terminate employee even if employee's gender had played no role in termination decision was for jury in Title VII action; although employee's infractions may have played role in termination, documentation of her infractions and discipline stemmed in part from sex discrimination. Civil Rights Act of 1964, § 706(g)(2)(B), as amended, 42 U.S.C.A. § 2000e-5(g)(2)(B).

[44] **Civil Rights**
Admissibility of Evidence; Statistical Evidence

District court did not abuse its discretion in excluding from Title VII action arbitration decisions relating to incident that triggered termination; discrimination was not covered by collective bargaining agreement (CBA) and thus was not issue in arbitration. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[45] **Federal Courts**
Instructions

Employer's failure to object to punitive damages instruction during trial of Title VII action did not preclude Court of Appeals from reviewing such instruction to ascertain whether it complied with *Kolstad v. American Dental Association*, which provided employers with good faith defense to punitive damages. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
2 Cases that cite this headnote

[46] **Federal Courts**
Instructions

The Court of Appeals has discretion to review a jury instruction despite a failure to object where a solid wall of Circuit authority would have rendered an objection futile.

1 Cases that cite this headnote

[47] **Civil Rights**
Exemplary or Punitive Damages

Jury's finding that employer engaged in egregious conduct did not obviate need, in course of whether deciding whether employer was liable for punitive damages under Title VII, to determine whether employer acted in good faith, inasmuch as egregious misconduct could not be equated with lack of good faith. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
3 Cases that cite this headnote

Attorneys and Law Firms

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Robert N. Peccole, Peccole & Peccole, Ltd., Las Vegas, NV, for plaintiff-appellant.

Appeal from the United States District Court for the District of Nevada; David Warner Hagen, District Judge, Presiding. D.C. No. CV-96-00009 DWH/ RJJ.

Before SCHROEDER, Chief Judge, REINHARDT, KOZINSKI, FERNANDEZ, KLEINFELD, SILVERMAN, GRABER, McKEOWN, FISHER, GOULD, and PAEZ, Circuit Judges.

Opinion

OPINION

McKEOWN, Circuit Judge

[1] We agreed to hear this case en banc1 primarily to examine the legal standard for proof of a violation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. In this classic instance of what has been termed a "mixed-motive" case, the employer, Caesars Palace Hotel and Casino ("Caesars"), terminated Catharina Costa, the only woman in her bargaining unit, citing disciplinary problems. Costa argued, and the jury agreed, that sex was "a motivating factor" in her termination. 42 U.S.C. § 2000e-2(m). Because Caesars failed to establish that she would have been terminated without consideration of her sex, the jury awarded back pay and compensatory damages. Finally, the jury found that the discrimination was "egregious" and warranted punitive damages. Caesars argues that Costa should have been held to a special, higher standard of "direct evidence," a threshold it claims she did not meet. We disagree. Title VII imposes no special or heightened evidentiary burden on a plaintiff in a so-called "mixed-motive" case. Consequently, we affirm the liability finding as well as the judgment for back pay and compensatory damages. In light of intervening Supreme Court authority, we remand with respect to punitive damages. *Kolstad v. Am. Dental Ass'n,* 527 U.S. 526, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999).

BACKGROUND

Catharina Costa is a trailblazer. She has worked most of her life in a male-dominated environment, driving trucks and operating heavy equipment. At Caesars, a well known casino in Las Vegas, she worked in a warehouse and, along with members of her bargaining unit, Teamsters Local 995, operated the forklifts and pallet jacks to retrieve food and beverage orders. Costa was the only woman in this job.

Costa's work was characterized as "excellent" and "good." As her supervisor explained: "We knew when she was out there the job would get done." Nonetheless, she experienced a number of problems with management and her co-workers. At first, she responded by simply focusing on doing her job well. Slowly, Costa began to notice that she was being singled out because she was a woman. Her concerns not only fell on deaf ears-"my word meant nothing"-but resulted in her being treated as an "outcast."

In a series of escalating events that included informal rebukes, denial of privileges ***845** accorded her male co-workers, suspension, and finally discharge, Costa's efforts to resolve problems were thwarted along the way. The situation deteriorated so significantly that she finally complained to the human resources department, which declined to intervene.

There were "so many" incidents, it was difficult for her to recount them all. Nonetheless, her testimony at trial on this point was detailed and extensive. For example, when men came in late, they were often given overtime to make up the lost time; when Costa came in late-in one case, one minute late-she was issued a written reprimand, known as a record of counseling. When men missed work for medical reasons, they were given overtime to make up the lost time; when Costa missed work for medical reasons, she was disciplined. On one occasion, a warehouse supervisor actually suspended her because she had missed work while undergoing surgery to remove a tumor; only the intervention of the director of human resources voided this action.

In another episode, corroborated at trial by a fellow employee who was an eyewitness, a number of workers were in the office eating soup on a cold day. A supervisor walked in, looked directly at Costa, and said, "Don't you have work to do?" He did not reprimand any of her colleagues-all men. Another supervisor began to follow her around the warehouse. Although several other Teamsters complained about this supervisor's scrutiny, three witnesses, in addition to Costa, testified that she was singled out for particularly intense "stalking."

Costa presented extensive evidence that she received harsher discipline than the men. For instance, she was frequently warned and even suspended for allegedly hazardous use of equipment and for use of profanity, yet other Teamsters engaged in this conduct with impunity. In at least one instance, such a charge against Costa was found to have been fabricated and the suspension voided. Supervisors began to "stack" her disciplinary record. In one case, a supervisor issued multiple warnings on a single day, including docking her for an absence that dated back over eight months and for absences that occurred when Costa was under a doctor's care. Another warehouse manager steered a co-worker who had a dispute with Costa to security instead of handling the matter himself because the manager wanted to bring "this problem with Costa to a 'head.' "

Costa was also treated differently than her male colleagues in the assignment of overtime. For example, in an analysis of 95.5 hours of overtime assigned to eight Teamsters, Costa received only two hours. Failure to assign overtime was not for Costa's lack of willingness to work additional hours. Costa was listed as "refusing" overtime when she was on vacation. When she was offered overtime, it was at the last minute, making it impractical for her to accept. The situation became more blatant when Costa asked her

supervisors point blank about the differential treatment of another Teamster who was favored with overtime assignments. The response: He "has a family to support."

Costa also presented evidence that she was penalized for her failure to conform to sexual stereotypes. Although her fellow Teamsters frequently lost their tempers, swore at fellow employees, and sometimes had physical altercations, it was Costa, identified in one report as "the lady Teamster," who was called a "bitch," and told "[y]ou got more balls than the guys." Even at trial, and despite testimony that she "got along with most people" and had "few arguments," Caesars' managers continued to characterize her as "strong ***846** willed," "opinionated," and "confrontational," leading counsel to call her "bossy" in closing argument. Supervisor Karen Hallett, who later signed Costa's termination order, expressly declared her intent to "get rid of that bitch," referring to Costa.

Supervisors frequently used or tolerated verbal slurs that were sex-based or tinged with sexual overtones. Most memorably, one co-worker called her a "fucking cunt." When she wrote a letter to management expressing her concern with this epithet, which stood out from the ordinary rough-and-tumble banter, she received a three-day suspension in response. Although the other employee admitted using the epithet, Costa was faulted for "engaging in verbal confrontation with co-worker in the warehouse resulting in use of profane and vulgar language by other employee."

These events culminated in Caesars' termination of Costa. The purported basis for termination was a physical altercation in the warehouse elevator with another Teamster, Herb Gerber. This incident began, as Gerber admitted, when he went looking for Costa, upset about a report that he believed she had made about his unauthorized lunch breaks. Gerber trapped Costa in an elevator and shoved her against the wall, bruising her arm. Costa gave a detailed account of the altercation. Right away she told supervisor Hallett. Reassured that Hallett would investigate, Costa returned to work, only to have Gerber seek her out and "come at" her a second time. Costa's account was also corroborated by her immediate reports to union officials, by photographs of the bruises, and by a witness who had seen Gerber blocking the elevator door. In contrast, Gerber did not immediately report the incident, had no physical corroboration, and provided few details. He first denied that the altercation was physical, but then changed his story to state that Costa had, in fact, hit him.

Nonetheless, Caesars did not believe Costa. Caesars reasoned that the facts were in dispute, so it disciplined both employees-Gerber with a five-day suspension and Costa with termination.

Both Costa and Gerber grieved their respective disciplines pursuant to the collective bargaining agreement, which did not cover sex discrimination. The arbitrator upheld both actions. After receiving an EEOC right to sue letter, Costa filed this suit. The trial court dismissed her claim of sexual harassment on summary judgment, but allowed the other disparate treatment claim to proceed.

At trial, Caesars maintained that Costa was terminated because of her disciplinary history and her altercation with Gerber. Costa did not suggest that she was a model employee, but rather that her sex was a motivating factor in her termination. After hearing Costa's testimony, Judge Hagen, the trial judge, admonished counsel: "This is a case that should have settled." He denied Caesars' motion for judgment as a matter of law at the close of Costa's case, which was renewed at the close of the evidence. The jury returned a verdict in favor of Costa for $64,377.74 back pay, $200,000 compensatory damages, and $100,000 punitive damages. When Judge Hagen denied defense motions for judgment as a matter of law notwithstanding the verdict, and for a new trial, he elaborated as follows: "At trial, the evidence showed a pattern of disparate treatment favoring male co-workers over plaintiff in the application of disciplinary standards, allowance of overtime, and in her termination. From this evidence reasonable minds could infer that plaintiff's gender played a motivating part in Caesars's conduct towards plaintiff ...." He did, however, ***847** grant remittitur, and Costa agreed to reduce compensatory damages to $100,000.

DISCUSSION

Title VII itself provides the benchmark for resolving the primary question in this case. Although the road from Title VII to resolution of Costa's case rests ultimately on a straightforward examination of the statute, it is helpful to examine the statute's structure and the history of the 1991 amendments to the statute. After analyzing the import of the passing reference to "direct evidence" in Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins,* 490 U.S. 228, 270, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), and the framework for Title VII cases, we address the evidence in Costa's case, including the claim that evidence of an arbitration award was erroneously excluded, and the propriety of giving a "mixed-motive" jury instruction. We conclude by examining the punitive damages award in light of *Kolstad,* 527 U.S. 526, 119 S.Ct. 2118, 144 L.Ed.2d 494.

I. TITLE VII STATUTORY FRAMEWORK AND DEVELOPMENT

Title VII prohibits discrimination "because of" a protected characteristic, such as race or sex. Such discrimination is deemed "an unlawful employment practice":

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

42 U.S.C. § 2000e-2(a).

The 1991 Act added § 2000e-2(m), which provides that "an unlawful employment practice is established" when a protected characteristic is "a motivating factor" in an employment action:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Civil Rights Act of 1965, Title VII, § 701, 42 U.S.C. § 2000e-2(m) (as amended by Civil Rights Act of 1991, Pub.L. No. 102-166, § 107(a), 105 Stat. 1071 (1991)).

The 1991 Act also provided an affirmative defense that limits the remedies if an employer demonstrates that it would have nonetheless made the "same decision":

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court-
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 2000e-5(g)(2)(B).

[2] We think this text is crystal clear: an employee makes out a Title VII violation by showing discrimination "because of" race, sex, or another protected factor. Such discrimination is characterized by the statute as "an unlawful employment practice."

***848 [3] [4]** More specifically, "an unlawful employment practice" encompasses any situation in which a protected characteristic was "a motivating factor" in an employment action, even if there were other motives. In such a case-sometimes labeled with the "mixed-motive" moniker-if the employee succeeds in proving only that a protected characteristic was one of several factors motivating the employment action, an employer cannot avoid liability altogether, but instead may assert an affirmative defense to bar certain types of relief by showing the absence of "but for" causation.

[5] [6] [4] The amendments to the statute have done nothing to change the plaintiff's long-standing burden: "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *accord Reeves v. Sanderson Plumbing Prods.,* 530 U.S. 133, 143, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). Nor can we discover anything in this statute that warrants imposing a special evidentiary rule on or hurdle for victims of discrimination to prove their case.

> The burden of showing something by a "preponderance of the evidence," the most common standard in the civil law, "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [it] may find in favor of the party who has the burden to persuade the [jury] of the fact's existence.' "

Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 622, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993) (quoting *In re Winship,* 397 U.S. 358, 371-72, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring) (citation omitted)). The inquiry is simply that of any civil case: whether the plaintiff's evidence is sufficient for a rational factfinder to conclude by a preponderance of the evidence that the employer violated the statute-that "race, color, religion, sex, or national origin was a motivating factor for any employment practice."

A. PRICE WATERHOUSE

Although Title VII imposes no special burden of proof on discrimination plaintiffs, some courts have fashioned a heightened burden based not on the statute but on the case that prompted its amendment, *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). We turn to that case. There, the Supreme Court confronted a problem not previously encountered in the statute's twenty-five year history: causation. The issue presented was whether there should be liability where an adverse employment decision was the result of mixed motives. More specifically, the trial court found that the failure to select Ann Hopkins for partner at an accounting firm was motivated both by legitimate concerns about her interpersonal skills and by "an impermissibly cabined view of the proper behavior of women." *Id.* at 236-37, 109 S.Ct. 1775.

All nine justices essentially agreed that liability was inappropriate where the employer would have made the same decision absent sex discrimination-in other words, the illegitimate factor was not a "but for" cause-but they divided over the nuances of the burden of proof. Four justices agreed that "when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." *Id.* at 258, 109 S.Ct. 1775 (plurality opinion). These justices ***849** made clear that when "an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex." *Id.* at 241, 109 S.Ct. 1775. But, the employer could escape liability through the "same decision" affirmative defense. The dissent criticized the plurality for "its shift to the defendant of the burden of proof," *id.* at 281, 109 S.Ct. 1775 (Kennedy, J., dissenting), and argued that the plaintiff should have to prove, by a preponderance of the evidence, that discrimination was the "but for" cause of the challenged action. In response, the plurality emphasized that it offered the defendant an affirmative defense to liability only *after* the plaintiff established that discriminatory animus played a role in the challenged employment action:

> [S]ince we hold that the plaintiff retains the burden of persuasion on the issue whether gender played a part in the employment decision, the situation before us is not ... one of "shifting burdens" .... Instead, the employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another.

Id. at 246, 109 S.Ct. 1775. Regardless of nomenclature, the plurality agreed that if the employer showed a lack of "but for" causation, then that showing precluded liability.

Justice O'Connor and Justice White each wrote separately, concurring in the judgment only. Justice White relied on *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), a First Amendment case holding that a showing that constitutionally protected conduct had been a "motivating factor" in an employment decision was sufficient to shift the burden to the state to prove the absence of causation. *Price Waterhouse,* 490 U.S. at 258-59, 109 S.Ct. 1775 (White, J., concurring in the judgment). He found it unnecessary to parse the semantic distinction whether "the *Mt. Healthy* approach is 'but-for' causation in another guise or creates an affirmative defense." *Id.* at 259, 109 S.Ct. 1775. Justice O'Connor traced the burdenshifting approach back to venerable tort cases such as *Summers v. Tice,* 33 Cal.2d 80, 199 P.2d 1, 3-4 (Cal.1948). *Price Waterhouse,* 490 U.S. at 263-64, 109 S.Ct. 1775 (O'Connor, J., concurring in the judgment).

Justice O'Connor had further gatekeeping concerns about when what she considered to be a special "burden shift" might be invoked, thus permitting the plaintiff to make less than the full showing necessary for a statutory violation:

> I believe there are significant differences between shifting the burden of persuasion to the employer in a case resting purely on statistical proof as in the disparate impact setting and shifting the burden of persuasion in a case like this one, where an employee has demonstrated by direct evidence that an illegitimate factor played a substantial role in a particular employment decision.

Id. at 275, 109 S.Ct. 1775. It was in this context that she discussed a need for "direct evidence" to show that the employer's "decisional process has been substantially infected by discrimination" before the special burden shift would be triggered. *Id.* at 269-70, 109 S.Ct. 1775. Because it was arguably the "narrowest ground" for the decision, Justice O'Connor's one-justice concurring opinion was considered by some to be the controlling analysis. *Fernandes v. Costa Bros. Masonry,* 199 F.3d 572, 580 (1st Cir.1999); *but see Thomas v. Nat'l Football League Players Ass'n,* 131 F.3d 198, 203 (D.C.Cir.1997) ("Justice ***850** O'Connor's concurrence was one of six votes

supporting the Court's judgment ..., so that it is far from clear that [it] should be taken as establishing binding precedent."), *as vacated in part on reh'g,* 1998 WL 1988451 (D.C.Cir. Feb.25, 1998); *Tyler v. Bethlehem Steel Corp.,* 958 F.2d 1176, 1183 (2d Cir.1992) (" '[D]irect evidence' was *not* a requirement imposed by the majority in *Price Waterhouse.*").

B. 1991 CIVIL RIGHTS ACT AMENDMENTS TO TITLE VII

Congress quickly responded to *Price Waterhouse* and a handful of other Supreme Court employment discrimination decisions with the introduction of the Civil Rights Act of 1990, which targeted "the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions." H.R. Conf. Rep. No. 101-856, at 1 (1990). Although the 1990 legislation ultimately floundered, an amended version, with much of the text intact, became the Civil Rights Act of 1991, which expressly overruled the basic premise that an employer could avoid all liability under Title VII by establishing the absence of "but for" causation.

Now, under Title VII, the use of a prohibited characteristic (race, color, religion, sex, or national origin) as simply "a motivating factor" in an employment action is unlawful. 42 U.S.C. § 2000e-2(a)(1). Congress did, however, add one safety valve: an employer can escape damages and orders of reinstatement, hiring, promotion and the like-but not attorney's fees or declaratory or injunctive relief-by proving the absence of "but for" causation as an affirmative defense. *Id.* § 2000e-2(m). To the extent that there was confusion after *Price Waterhouse*-semantic or otherwise-with respect to burden shifting, the amendment clarified (1) that a Title VII violation is established through proof that a protected characteristic was "a motivating factor" in the employment action and (2) that the employer's "same decision" evidence serves as an affirmative defense with respect to the scope of remedies, not as a defense to liability.

The legislative history evinces a clear intent to overrule *Price Waterhouse.* In a subsection titled "The Need to Overturn *Price Waterhouse,*" the report accompanying the 1991 Civil Rights Act reflects congressional concern that the "inevitable effect of the *Price Waterhouse* decision [was] to permit prohibited employment discrimination to escape sanction under Title VII." H.R.Rep. No. 102-40(I), at 46 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 584. The report elaborates:

> When Congress enacted the Civil Rights Act of 1964, it precluded all invidious consideration of a person's race, color, religion, sex or national origin in employment. The effectiveness of Title VII's ban on discrimination on the basis of race, color, religion, sex or national origin has been severely undercut by the recent Supreme Court decision in *Price Waterhouse v. Hopkins.*

Id. at 45. We do not disagree with those courts that have noted that the legislative history does not address Justice O'Connor's "direct evidence" comment. *See, e.g., Watson v. Southeastern Pa. Transp. Auth.,* 207 F.3d 207, 218-19 (3d Cir.2000), *cert. denied,* 531 U.S. 1147, 121 S.Ct. 1086, 148 L.Ed.2d 961 (2001).2 What the history does show beyond doubt, however, is that the premise for Justice O'Connor's comment is wholly abrogated: No longer may ***851** "employers' discriminatory conduct escape[ ] liability," H.R. Rep. 40(I) at 47, simply by showing other sufficient causes. Consequently, there is no longer a basis for any special "evidentiary scheme" or heightened standard of proof to determine "but for" causation.

C. "DIRECT EVIDENCE"

Following *Price Waterhouse* and the Civil Rights Act of 1991, much has been made of Justice O'Connor's passing reference to "direct evidence." Indeed, the reference has spawned a virtual cottage industry of litigation over the effect and meaning of the phrase. It is unnecessary, however, to get mired in the debate over whether Justice O'Connor's opinion was controlling or not because the resolution to this conundrum lies in the 1991 amendments.

Justice O'Connor's reference must be interpreted in light of the Court's understanding at the time of *Price Waterhouse,* namely, that "but for" causation was factored into proof of a Title VII violation, either as an affirmative defense (plurality) or as part of the plaintiff's proof (dissent). Justice O'Connor wrote separately in part to "express [her] views as to when and how the strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation should be administered." *Price Waterhouse,* 490 U.S. at 262, 109 S.Ct. 1775. Her reference to "direct evidence" was intertwined with her concern about a scheme that shifted the burden on the question of liability from the employee to employer, albeit through an affirmative defense. The 1991 Act eliminated any confusion about burden-shifting and the proof necessary for a Title VII violation, so it is not surprising that courts have had trouble converting Justice O'Connor's reference into a legal standard under the new statutory provision.

The resulting jurisprudence has been a quagmire that defies characterization despite the valiant efforts of various courts and commentators. Within circuits, and often within opinions, different approaches are conflated, mixing burden of persuasion with evidentiary standards, confusing burden of ultimate persuasion with the burden to establish an affirmative defense, and declining to acknowledge the role of circumstantial evidence. We see no need to get bogged down in this debate. Rather, based on the language of the statute-which requires proof of only "a motivating factor" and does not set out any special proof burdens-we conclude that Congress did not impose a special or heightened evidentiary burden on the plaintiff in a Title VII case in which discriminatory animus may have constituted one of two or more reasons for the employer's challenged actions. 42 U.S.C. § 2000e-2(m).

This approach is consistent with recent Supreme Court cases underscoring that no special pleading or proof hurdles may be imposed on Title VII plaintiffs. For example, in *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 122 S.Ct. 992, 997-99, 152 L.Ed.2d 1 (2002), the Court struck down judicially imposed heightened pleading standards. Just two years earlier, in *Reeves,* 530 U.S. at 148, 120 S.Ct. 2097, it declined to require independent evidence of discrimination in addition to prima facie evidence and sufficient evidence to rebut pretext. Instead, the Court emphasized that the jury determines the ultimate question of liability. *Id.* Sticking to the statutory wording, in *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 80-81, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), the Court rejected various circuits' special requirements for same-sex sexual harassment cases. Finally, in *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 752-53, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), the Court quashed distinctions between "quid ***852** pro quo" and "hostile environment" liability structures in harassment cases. Here, too, we believe that we are well advised to follow the statute instead of engaging in judicial invention.

To understand why we should stick to the statute rather than divine a new standard of proof, it is instructive to look at the state of circuit law in this area. Judge Selya has made an attempt to categorize the circuits' approaches in a framework that provides a useful overview. *Fernandes,* 199 F.3d at 582. He first discusses the "classic" position, an approach that takes the definition of "direct evidence" from the dictionary: " 'evidence, which if believed, proves existence of fact in issue *without inference or presumption.*' " *Rollins v. TechSouth, Inc.,* 833 F.2d 1525, 1529 n. 6 (11th Cir.1987) (quoting *Black's Law Dictionary* 413 (5th ed.1979)) (emphasis in *Rollins*). Judge Selya notes that "only the Fifth and Tenth Circuits cling consistently to this view, [but] other tribunals have embraced it periodically." *Fernandes,* 199 F.3d at 582.

Next is the "animus plus" position, which basically requires that the plaintiff prove a particularly strong case-more than ordinarily would be required for an inference of discrimination to be permissible. Our review indicates that a majority of courts that impose a "direct evidence" requirement adhere to this view, either explicitly or implicitly. *See, e.g., Thomas,* 131 F.3d at 204 (defining direct evidence as "a relationship between proof and incidents"); *Fernandes,* 199 F.3d at 580 (explaining the function of direct evidence as restricting the mixed-motive analysis "to those infrequent cases in which a plaintiff can demonstrate [discrimination] with a high degree of assurance"); *Fuller v. Phipps,* 67 F.3d 1137, 1143 (4th Cir.1995) (holding that the determination "hinges on the strength of the evidence"); *Bass v. Bd. of County Comm'rs,* 256 F.3d 1095, 1105 (11th Cir.2001) (requiring, under the rhetoric of banning circumstantial evidence, "only the most blatant remarks") (citation omitted). Judge Selya places the Fourth, D.C., Ninth,3 and Third circuits in this camp, not without hesitation, and indicates that other circuits indicate "occasional approval" of this approach. *Fernandes,* 199 F.3d at 582.

Finally, there is the "animus" position, which simply requires evidence that bears on the alleged discriminatory animus or, put even more simply, evidence of discrimination. Judge Selya places the Second Circuit, the Eighth Circuit "intermittently," and other stray cases, in this camp. *Id.*

Other courts and commentators have had even more difficulty articulating an order to the chaos. *See, e.g., Thomas,* 131 F.3d at 205 (citing Fifth, Tenth, and Eleventh Circuits as taking "direct evidence" to mean non-inferential); Christopher Y. Chen, Note, *Rethinking the Direct Evidence Requirement: A Suggested Approach in Analyzing Mixed Motives Discrimination Claims,* 86 Cornell L.Rev. 899, 908-15 (2001); Robert Belton, *Mixed Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp,* 51 Mercer L.Rev. 651, 663 (2000) ("The line between *McDonnell Douglas* and *Price Waterhouse* is very murky.").

Indeed, within circuits, cases sometimes take different approaches. *See Wright v. Southland Corp.,* 187 F.3d 1287, 1294 (11th Cir.1999) (recognizing intra-circuit ***853** splits). For example, the First Circuit first embraced the animus plus approach in *Fernandes,* 199 F.3d at 580, but recently implied in *Weston-Smith v. Cooley Dickinson Hospital,* 282 F.3d 60, 64 (1st Cir.2002), that it took the classic approach. The Eleventh Circuit first allowed "broad statements" of discriminatory attitude, *Burrell v. Bd. of Trustees of Ga. Military Coll.,* 125 F.3d 1390, 1394 n. 7 (11th Cir.1997), but later concluded that only statements related to the decisionmaking process were sufficient to

overcome the special "direct evidence" hurdle, *Bass,* 256 F.3d at 1105.

In a carefully considered decision issued shortly after the Civil Rights Act of 1991, the Second Circuit held that direct evidence simply meant evidence sufficient to permit the trier of fact to conclude that an illegitimate characteristic was a motivating factor in the challenged decision under Title VII. *Tyler,* 958 F.2d at 1185. However, a few months later, a different panel held that discrimination victims face the special hurdle of presenting "evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude." *Ostrowski v. Atlantic Mut. Ins. Cos.,* 968 F.2d 171, 182 (2d Cir.1992). Although *Ostrowski* squarely rejected a definition of "direct evidence" as non-circumstantial evidence, *id.* at 181, some cases quote it as though it supported the noncircumstantial requirement. *See, e.g., Cronquist v. City of Minneapolis,* 237 F.3d 920, 925 (8th Cir.2001). *Ostrowski* was an age discrimination case, but has been widely applied in the Title VII context, apparently without analysis of the difference in the statutes. *See, e.g., Lightfoot v. Union Carbide Corp.,* 110 F.3d 898, 913 (2d Cir.1997).

In the Tenth Circuit, the court initially declined to impose a heightened "direct evidence" requirement, only to be ignored by a panel ruling six months later. *Compare Medlock v. Ortho Biotech, Inc.,* 164 F.3d 545, 553 (10th Cir.1999) ("A mixed motive instruction is ... appropriate in any case where the evidence is sufficient to allow a trier to find both forbidden and permissible motives." (citation and internal quotation marks omitted)) *with Shorter v. ICG Holdings, Inc.,* 188 F.3d 1204, 1207 (10th Cir.1999) (imposing a "direct evidence" requirement as classically defined, and excluding "statements of personal opinion, even when reflecting a personal bias").

[7] We believe that the best way out of this morass is a return to the language of the statute, which imposes no special requirement and does not reference "direct evidence." To the extent that courts are using "direct evidence" as a veiled excuse to substitute their own judgment for that of the jury, we reject that approach. In so doing, we follow the Second Circuit's *Tyler* case, 958 F.2d at 1184-85, the Eleventh Circuit's *Wright* case, 187 F.3d at 1301-02, the Tenth Circuit's approach in *Medlock,* 164 F.3d at 553, and the Eighth Circuit in *Schleiniger v. Des Moines Water Works,* 925 F.2d 1100, 1101 (8th Cir.1991). We also agree with other courts to the extent that they hold that non circumstantial evidence is not the magical threshold for Title VII liability. *See, e.g., Thomas,* 131 F.3d at 203 (collecting cases).

[8] [9] [10] Put simply, the plaintiff in any Title VII case may establish a violation through a preponderance of evidence (whether direct or circumstantial)[4] that a ***854** protected characteristic played "a motivating factor." Like the Supreme Court, "we think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code." *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 515, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). The "direct evidence" quagmire results from just such a misdirected inquiry, and we decline to be drawn in.

D. THE FRAMEWORK FOR PROVING A TITLE VII VIOLATION

In addition to the confusion over "direct evidence," there has been considerable misunderstanding regarding the relationship among the *McDonnell Douglas* burden-shifting analysis (sometimes referred to as "pretext" analysis), which primarily applies to summary judgment proceedings, and the terms single-motive and mixed-motive, which primarily refer to the theory or theories by which the defendant opposes the plaintiff's claim of discrimination. The short answer is that all of these concepts coexist without conflict.

Caesars' argument in favor of a higher evidentiary burden is emblematic of the confusion. Caesars maintains that without special proof, "any plaintiff who is able to establish a prima facie showing in a pretext case would qualify for a mixed-motive instruction, conflating the two categories of cases." This argument mistakenly juxtaposes the pretrial *McDonnell Douglas* legal framework and the "mixed-motive" characterization.

[11] To place *McDonnell Douglas* in perspective, it must be remembered that the current form of Title VII is the result of twenty-seven years of dynamic exchange between the Supreme Court and Congress, working toward a framework that provides a remedy for barriers of discrimination and inequality in the workplace. Early in the statute's history, the Supreme Court distinguished disparate impact claims under Title VII § 703(a)(2) from disparate treatment claims under § 703(a)(1). Civil Rights Act of 1964, Pub.L. No. 88-352, tit. VII, § 703(a). Disparate treatment claims require the plaintiff to prove that the employer acted with conscious intent to discriminate. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 805-06, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) (distinguishing *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)).

[12] [13] *McDonnell Douglas* was the first in a series of cases dealing with the difficulties of proving intent to discriminate in a disparate treatment context. The Supreme

Court detailed circumstances sufficient to support an inference of discrimination, the now-eponymous *McDonnell Douglas* "prima facie case and burden-shifting paradigm."[5] The Court recently reaffirmed that "the precise requirements of a prima facie case can vary depending on the context and were 'never intended to be rigid, mechanized, or ritualistic.' " *Swierkiewicz,* 122 S.Ct. at 995 ***855** (quoting *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978)). This legal proof structure is a tool to assist plaintiffs at the summary judgment stage so that they may reach trial.

As the Supreme Court elaborated a few years after *McDonnell Douglas,* the prima facie case "eliminates the most common nondiscriminatory reasons for the plaintiff's rejection." *Burdine,* 450 U.S. at 254, 101 S.Ct. 1089. Therefore, "we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Id.* (citation and internal quotation marks omitted). *Burdine* clarified, however, that the plaintiff need not rely on this presumption: "She may succeed ... either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256, 101 S.Ct. 1089.

Throughout these cases and those that followed, the court reaffirmed the canons of proof: the plaintiff retains the "ultimate burden of persuading the court that she has been the victim of intentional discrimination," *id.* at 256, 101 S.Ct. 1089; the question comes down to whether she has made her case. *See also Hicks,* 509 U.S. at 511, 113 S.Ct. 2742; *Reeves,* 530 U.S. at 142-49, 120 S.Ct. 2097.

[14] [15] [16] The plaintiff may make out a prima facie case-which may, admittedly, be a weak showing-that entitles her to a commensurately small benefit, a transitory presumption of discrimination: the burden of *production* only shifts briefly to the employer to explain why it took the challenged action, if not based on the protected characteristic. In practice, employers quickly rebut the presumption and it "drops from the case." *Burdine,* 450 U.S. at 256 n. 10, 101 S.Ct. 1089; *see also* Deborah C. Malamud, *The Last Minuet: Disparate Treatment after Hicks,* 93 Mich. L.Rev. 2229, 2302-04 (1995). The burden of production then shifts back to the plaintiff to introduce evidence from which the factfinder could conclude that the employer's proffered reason was pretextual. The burden of *persuasion* always remains with the employee to prove the ultimate Title VII violation-unlawful discrimination.

[17] [18] It is important to emphasize, however, that nothing compels the parties to invoke the *McDonnell Douglas* presumption. *United States Postal Serv. Bd. v. Aikens,* 460 U.S. 711, 717, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). Evidence can be in the form of the *McDonnell Douglas* prima facie case, or other sufficient evidence-direct or circumstantial-of discriminatory intent. *Id.* at 714 & n. 3, 717, 103 S.Ct. 1478. Thus, although *McDonnell Douglas* may be used where a single motive is at issue, this proof scheme is not the exclusive means of proof in such a case. Indeed, it also might be invoked in cases in which the defendant asserts a "same decision" defense to certain remedies, a circumstance in which mixed motives are at issue.

[19] [20] Regardless of the method chosen to arrive at trial, it is not normally appropriate to introduce the *McDonnell Douglas* burden-shifting framework to the jury.[6] At that stage, the framework "unnecessarily evade[s] the ultimate question ***856** of discrimination *vel non.*" *Aikens,* 460 U.S. at 714, 103 S.Ct. 1478.

[21] [22] [23] Once at the trial stage, the plaintiff is required to put forward evidence of discrimination "because of" a protected characteristic.[7] After hearing both parties' evidence, the district court must decide what legal conclusions the evidence could reasonably support and instruct the jury accordingly. This determination is distinct from the question of whether to invoke the *McDonnell Douglas* presumption, which occurs at a separate, earlier stage of proceedings, involves summary judgment rather than jury instructions, and is unrelated to the number of possible motives for the challenged action. Instead, the choice of jury instructions depends simply on a determination of whether the evidence supports a finding that just one-or more than one-factor actually motivated the challenged decision. Justice White, in his concurring opinion in *Price* Waterhouse, succinctly described how the type of evidence presented affects the question facing the jury:

> In [single-motive] cases, "the issue is whether either illegal or legal motives, but not both, were the 'true' motives behind the decision." In mixed-motive cases, however, there is no one "true" motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate.
> *Price Waterhouse,* 490 U.S. at 260, 109 S.Ct. 1775 (White, J., concurring in the judgment) (citation omitted).[8] Following the 1991 amendments, characterizing the evidence as mixed-motive instead of single-motive results only in the availability of a different defense, a difference which derives directly from the statutory text, not from judicially created proof structures.

As a practical matter, the question of how many motives the evidence reasonably supports affects the jury

instructions as follows:

[24] [25] [26] If, based on the evidence, the trial court determines that the only reasonable conclusion a jury could reach is that discriminatory animus is the *sole* cause for the challenged employment action or that discrimination played *no* role at all in the employer's decisionmaking, then the jury should be instructed to determine whether the challenged action was taken "because of" the prohibited reason. 42 U.S.C. § 2000e 2(a); *see also Oncale,* 523 U.S. at 79-80, 118 S.Ct. 998 (emphasizing "because of" standard). If the jury determines that the employer acted because of discriminatory intent, the employee prevails and may receive the full remedies available under Title VII; if not, the employer prevails. In such cases the employer does not benefit from the "same decision" defense, which, if successful, significantly limits the employee's remedies.

[27] [28] In contrast, in cases in which the evidence could support a finding that discrimination is one of two or more reasons for the challenged decision, at least one of which may be legitimate, the jury should be instructed to determine first whether the discriminatory reason was "a ***857** motivating factor" in the challenged action. If the jury's answer to this question is in the affirmative, then the employer has violated Title VII. However, if the jury then finds that the employer has proved the "same decision" affirmative defense by a preponderance of the evidence, 42 U.S.C. § 2000e-5(g)(2)(B), the employer will escape the imposition of damages and any order of reinstatement, hiring, promotion, and the like, and is liable solely for attorney's fees, declaratory relief, and an order prohibiting future discriminatory actions.

[29] Regardless of what kind of instructions are given, we emphasize that there are not two fundamentally different types of Title VII cases. In some cases, the employer may be entitled to the "same decision" affirmative defense instruction. In others, it may not. The employee's ultimate burden of proof in all cases remains the same: to show by a preponderance of the evidence that the challenged employment decision was "because of" discrimination.

Finally, we turn to the question of where the concept of pretext fits in this framework. Although cases in which the *McDonnell Douglas* framework is applied are sometimes referred to as "pretext cases," and we have no wish to change a quarter century of usage, it should be noted that questions of pretext may arise in any Title VII case, regardless of whether it is analyzed under *McDonnell Douglas.* Cases in which the dispute is only over whether or not the employer possessed the discriminatory motive alleged need not involve pretext, although they often do. For example, if the plaintiff chooses not to invoke the *McDonnell Douglas* framework, the employer need not proffer any explanation for the challenged action, but may simply require the plaintiff to prove her case of discrimination. Nor is the concept of pretext alien to cases in which an employer asserts a "same decision" or "but for" defense. For example, one of the employer's purportedly legitimate reasons may be pretextual. On the other hand, another may not. As Justice O'Connor recently explained in writing for the Court: "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination ...." *Reeves,* 530 U.S. at 147, 120 S.Ct. 2097.

[30] To summarize: *McDonnell Douglas* and "mixed-motive" are not two opposing types of cases. Rather, they are separate inquiries that occur at separate stages of the litigation. Nor are "single-motive" and "mixed-motive" cases fundamentally different categories of cases. Both require the employee to prove discrimination; they simply reflect the type of evidence offered. Where the employer asserts that, even if the factfinder determines that a discriminatory motive exists, the employer would in any event have taken the adverse employment action for other reasons, it may take advantage of the "same decision" affirmative defense. The remedies will differ if the employer prevails on that defense. With this framework in mind, we turn to the evidence in Costa's case.

II. MIXED MOTIVE INSTRUCTION AND SUFFICIENCY OF THE EVIDENCE

Although Caesars invokes the *McDonnell Douglas* analysis, that framework is not instructive at this stage of the case. *See Aikens,* 460 U.S. at 713-14, 103 S.Ct. 1478. Rather, we are asked to review the district court's decision to give a mixed-motive instruction and the sufficiency of the evidence to support the jury's verdict, as challenged in a motion for judgment as a matter of law made at the close of the evidence.

*858 A. THE MIXED MOTIVE JURY INSTRUCTION

[31] [32] We must first determine the applicable standard of review. The standards are well known and often stated: we generally review the formulation of instructions for abuse of discretion, but whether an instruction misstates the law is a legal issue reviewed de novo. *See, e.g., Voohries-Larson v. Cessna Aircraft Co.,* 241 F.3d 707, 713 (9th Cir.2001). At issue here is whether the evidence can be characterized as establishing multiple motives, and thus

warranting the affirmative defense. Because this evaluation is, at bottom, an evaluation of the evidence, an abuse of discretion standard is appropriate.

[33] The district court submitted both claims-the termination and the conditions of employment-to the jury. It first instructed the jury that:

> The plaintiff has the burden of proving each of the following by a preponderance of the evidence:
>
> 1. Costa suffered adverse work conditions, and
>
> 2. Costa's gender was a motivating factor in any such work conditions imposed upon her. Gender refers to the quality of being male or female.
>
> If you find that each of these things has been proved against a defendant, your verdict should be for the plaintiff and against the defendant. On the other hand, if any of these things has not been proved against a defendant, your verdict should be for the defendant.

The jury was next given the following mixed-motive instruction, which is central to this appeal:

> You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.

Caesars first intimates that the wording of the mixed motive instruction was invalid because it inappropriately implied a judicial determination that sex was in fact a motivation for the challenged treatment. Caesars, however, waived any objection to the form of the instruction by conceding at trial that it was "a reasonable statement of the mixed motive instruction." Fed.R.Civ.P. 51; *Shaw v. City of Sacramento,* 250 F.3d 1289, 1293 (9th Cir.2001) (as amended).

[34] As for Caesars' main contention, we are not persuaded that the district court erred in giving a mixed-motive instruction. In many respects, Costa's case presents a typical Title VII case in which a plaintiff alleges that she was discharged or disciplined for a discriminatory reason and the employer counters that the reason for its action was entirely different. The evidence did not require the jury to believe that discrimination was the only motive, nor that Caesars' stated reasons were all bogus or pretextual. For example, there was evidence that Hallett, Stewart, and other decisionmakers were legitimately concerned about Costa's behavior and altercations with co-workers, but there was likewise significant evidence that they ***859** would not have taken such drastic disciplinary measures against a man. Similarly, the jury could reasonably have concluded that the overtime assignment system was in a state of disarray that allowed favoritism and that one element of that favoritism was preferential treatment for male workers. The fact is that Caesars may have had legitimate reasons to terminate Costa. Indeed, unlike in many Title VII cases, Costa does not dispute many of the events that took place. Nor does she wholly discount that these events may have been part of the basis for her discipline and termination. Nonetheless, the wide array of discriminatory treatment is sufficient to support a conclusion that sex was also a motivating factor in the decision-making process. Thus, the district court did not abuse its discretion in giving a mixed-motive instruction.

B. SUFFICIENCY OF THE EVIDENCE

[35] [36] [37] [38] [39] We review de novo Caesars' challenge to the district court's denial of its Rule 50(b) motion for judgment as a matter of law. *Johnson v. Paradise Valley Unified Sch. Dist.,* 251 F.3d 1222, 1226 (9th Cir.2001), *cert. denied,* 534 U.S. 1055, 122 S.Ct. 645, 151 L.Ed.2d 563 (2001). At the outset, we note that the standard that Caesars must meet is very high. We can overturn the jury's verdict and grant such a motion only if " 'there is no legally sufficient basis for a reasonable jury to find for that party on that issue.' " *Reeves,* 530 U.S. at 149, 120 S.Ct. 2097 (quoting Fed.R.Civ.P. 50(a)). Because we "may not substitute [our] view of the evidence for that of the jury," *Johnson,* 251 F.3d at 1227, we neither make credibility determinations nor weigh the evidence and we must draw all inferences in favor of Costa, *Reeves,* 530 U.S. at 150, 120 S.Ct. 2097 (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). The Supreme Court cautions us to "disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* at 151, 120 S.Ct. 2097. This high hurdle recognizes that credibility, inferences, and factfinding are the province of the jury, not this court.

1. LIABILITY DETERMINATION

[40] Applying the analysis outlined above, we begin, not surprisingly, with the text of the statute, asking whether a reasonable jury could conclude that sex was "a motivating factor" in the challenged actions. The discriminatory treatment ran the gamut from disparate discipline and "stacking" Costa's personnel file to stalking her, singling her out for different treatment in the workplace, and discriminating against her in the assignment of overtime. In the final analysis, the jury heard testimony from Costa and fifteen other witnesses. Testimony included the chronology of escalating discipline and targeting of Costa, co-workers who identified discrimination because of sex, and multiple examples of disparate treatment purposefully directed at Costa because of her sex. Lending credence to the claim that sex was a motivating factor in her treatment, Costa also offered evidence of sexual stereotyping and sexual epithets. Viewing the evidence from her perspective and drawing all inferences in her favor, we cannot conclude that "there is no legally sufficient evidentiary basis for a reasonable jury," *Reeves,* 530 U.S. at 135, 149, 120 S.Ct. 2097, to find that intentional discrimination on the basis of sex was "a motivating factor" in subjecting Costa to a number of adverse employment actions, and culminating in her termination.

Costa presents overwhelming evidence that she was more harshly treated than her male coworkers. Because she was the only woman in an otherwise all-male unit, linking the differential treatment to her ***860** sex was not a difficult leap. The jury could easily infer that sex was one of the reasons Costa was singled out for negative treatment. Indeed, the evidence is sufficiently strong that for many of the incidents the jury might have concluded that sex was the only reason for the adverse action. "Proof of discriminatory motive ... can in some situations be inferred from the mere fact of differences in treatment." *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). Mindful of the Supreme Court's admonishment to "draw all reasonable inferences in favor of" the prevailing party, *Reeves,* 530 U.S. at 151-52, 120 S.Ct. 2097, we conclude that the jury was entitled to view the differential treatment here as evidence of discrimination.

In a case quite similar to this one, *Sischo-Nownejad v. Merced Community College District,* 934 F.2d 1104, 1112 (9th Cir.1991), we held that a plaintiff had made a showing sufficient to create a factual issue. The plaintiff there, the only woman holding a full-time faculty appointment in the art department of a community college, alleged that she was denied a choice as to which courses to teach and that she was deprived of supplies, whereas male co-workers were not. The college was also nonresponsive to reasonable requests for leave and disciplined her for petty offenses. *Id.* at 1107-08. Similarly, Costa presented evidence that she was denied overtime and medical leave where male co-workers were not. Her work was supervised more intensely than that of male colleagues. She was reprimanded for minor infractions while men, sitting right next to her and engaging in the same conduct, were not. Thus, this is a case where "the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose." *Am. Ship Bldg. Co. v. NLRB,* 380 U.S. 300, 311-12, 85 S.Ct. 955, 13 L.Ed.2d 855 (1965) ("[W]here many have broken a shop rule, but only union leaders have been discharged, the Board need not listen too long to the plea that shop discipline was simply being enforced.").

The most prominent example of this differential treatment was Caesars' decision to terminate Costa for an incident that netted her male co-worker only a five-day suspension. Costa's claim that she was shoved against an elevator wall and sustained bruises from the altercation is not one to be taken lightly. The excuse that the management could not figure out whom to believe-Costa or Gerber-is questionable given the strong corroboration of Costa's story and the inconsistencies in Gerber's account. The explanation offered by Caesars was lacking in several respects, and the jury was certainly not required to believe it. The jury was entitled instead to infer that Costa was fired, while Gerber was only suspended, because Costa was a woman. This is precisely the circumstance in which we credit the inference in Costa's favor.

Finally, the jury could easily have believed that Costa's record was itself largely a result of discrimination because of repeated incidents of unfair discipline that accumulated over time. For example, her supervisor's decision to backfill the records with prior alleged misconduct supports such a conclusion. *See Pogue v. United States Dep't of Labor,* 940 F.2d 1287, 1291 (9th Cir.1991). In *Pogue,* we held that the Department of Labor acted, at least in part, with impermissible retaliatory motives, because the employee's "prior work performance and defiant attitude cited by the Secretary could reasonably be attributed to the Navy's admitted retaliation." *Id.* Moreover, "Pogue presented evidence, ***861** relied on by the ALJ, that the disciplinary actions taken against her were substantially disproportionate to discipline imposed by the Navy in the past." *Id.*

Caesars presents us with alternate rationales for the termination, and asks us to hold as a matter of law that Costa's conduct was the only element motivating its decision. We decline this invitation. Perhaps the disparities in how Costa was treated were in part because supervisor Hallett disliked her as a person and not as a woman. Perhaps they were in part because Costa had a history of

"not getting along" with her co-workers, although there was contrary testimony. What the jury implicitly concluded, however, was that the disparities were also in part because she was a woman. In so finding, the jury did not necessarily reject all of Caesars' legitimate complaints about Costa. But even if it credited certain of these explanations, in following the jury instructions, it reasonably found that sex was "a motivating factor" in the termination. The evidence of differential treatment was so persuasive and longstanding that the judgment may be upheld on this ground alone. "[I]t is primarily the province of the jury to determine what inferences can be drawn from circumstantial evidence. So long as the evidence can reasonably support an inference of discrimination, the court should not upset the jury's decision." *Norton v. Sam's Club,* 145 F.3d 114, 119 (2d Cir.1998).

We turn next to Costa's evidence that she was chastised for failing to conform to the role stereotypically assigned to women. The jury heard remarks that could reasonably be viewed to "stem[ ] from an impermissibly cabined view of the proper behavior of women." *Price Waterhouse,* 490 U.S. at 236-37, 109 S.Ct. 1775. She was told that she did not deserve overtime because she did not have a family to support. In her view, the implication was that she was not *a man* with a family to support. The jury could interpret this as a comment directed to her as a woman, indicating that the discriminatory action, a failure to assign overtime, was based on her not being a male breadwinner. The Seventh Circuit held similar facts to be evidence of sex stereotyping. *See Bruno v. City of Crown Point,* 950 F.2d 355, 362 (7th Cir.1991) (holding that jury could believe employer held sexual stereotypes when female paramedic applicant was the only one asked about family responsibilities).

She was also disciplined in circumstances that the jury could reasonably infer amounted to telling her to "walk more femininely, talk more femininely." *Price Waterhouse,* 490 U.S. at 235, 109 S.Ct. 1775. For example, Costa was told "[y]ou got more balls than the guys." And yet, arguably when she acted tough like the guys, she received harsher discipline rather than an "atta boy" reinforcement. At trial, Caesars' consistent objection to Costa as an employee was that she was "strong-willed" and "opinionated," a view that the jury could have reasonably interpreted as gender stereotyping. As was clear from her testimony, Costa sought no special treatment, only equal treatment.

[41] Finally, reinforcing the inference that her gender motivated the adverse view of her character, Costa presented evidence of sexual language and epithets directed to her. Specifically, Costa presented evidence that Hallett, the very supervisor who signed her discharge, had declared an intention on several occasions to "get rid of that bitch." Whether this term is part of the everyday give-and-take of a warehouse environment or is inherently offensive is not for us to say. Instead, we simply conclude that the jury could interpret it here to be one piece of evidence ***862** among many, a derogatory term indicating sex-based hostility.9 In addition, managers encouraged sex-based epithets directed at Costa by disciplining her for failing to tolerate the slurs silently. Admittedly, Costa worked in a rough and tumble and often vulgar environment. But the prevalence of race or sex-based slurs does not excuse them. *See Swinton v. Potomac Corp.,* 270 F.3d 794, 807 (9th Cir.2001), *cert. denied,* 535 U.S. 1018, 122 S.Ct. 1609, 152 L.Ed.2d 623 (2002).

[42] As we explained in *Steiner v. Showboat Operating Co.,* 25 F.3d 1459, 1463-64 (9th Cir.1994), when abuse directed at women "center[s] on the fact that they[are] females," a jury may infer discrimination. In *Steiner,* a hostile environment case, a supervisor "was indeed abusive to men, but ... his abuse of women was different. It relied on sexual epithets, offensive, explicit references to women's bodies and sexual conduct." *Id.* at 1463 (citing *Harris v. Forklift Sys. Inc.,* 510 U.S. 17, 19, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)). Similarly here, the evidence supports the inference that the abuse directed toward Costa was different in nature and degree.

In the context of this case, we need not decide whether this sexual language is dispositive of discrimination. Rather, this language was simply one more factor for the jury to consider in the face of repeated differential treatment by Hallett and others at Caesars. Viewing the evidence in Costa's favor, the jury could have easily inferred that the use of highly charged and offensive sexual language was simply another means of singling Costa out because she was a woman.

Finally, we detour briefly to address the suggestion that Hallett was somehow incapable of discriminating against Costa because Hallett was herself a woman. This argument was resoundingly rejected by a unanimous Supreme Court in *Oncale,* 523 U.S. at 80-81, 118 S.Ct. 998. In a society where historically discriminatory attitudes about women are "firmly rooted in our national consciousness," *Frontiero v. Richardson,* 411 U.S. 677, 684, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) (plurality opinion), we cannot discount that the jury perceived Hallett, a former Army officer now placed in a supervisory position in a virtually male-only world, as demonstrating hostility toward Costa as a woman as a means of showing that she was "one of the boys." *See also J.E.B. v. Alabama ex rel T.B.,* 511 U.S. 127, 136-37, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) ("[O]ur nation has had a long and unfortunate history of sex discrimination ....") (quoting *Frontiero,* 411 U.S. at

684, 93 S.Ct. 1764). Life was not necessarily easy for Hallett, but that was no excuse for visiting harsh discipline on Costa.

2. AFFIRMATIVE DEFENSE-"SAME DECISION"

[43] Once the jury found liability on the part of Caesars, it was asked to decide whether the "defendant proved by a preponderance ***863** of the evidence that the defendant would have made the same decisions if the plaintiff's gender had played no role in the employment decision." The jury checked the "NO" box. This question on the special verdict form reflects the "same decision" affirmative defense provided in 42 U.S.C.2000e-5(g)(2)(B); *O'Day v. McDonnell Douglas Helicopter Co.,* 79 F.3d 756, 759-60 (9th Cir.1996).

Caesars, not Costa, has the burden on this question, and we must still filter the evidence in the light most favorable to Costa. Under this lens, much of the evidence of differential treatment removes this question from the realm of the hypothetical and shows what, in fact, Caesars did do when men violated its policies. Costa's infractions may have played a role in her termination. But the evidence also underscores how the documentation of her infractions and discipline stemmed in part from sex discrimination. Based on the extensive testimony, the jury simply did not believe that Caesars would have made the same decision "but for" Costa's sex. There was a substantial basis for the jury to conclude that Caesars did not meet its burden in demonstrating that it would have made the same decision absent consideration of sex.

III. ADMISSIBILITY OF ARBITRATION DECISIONS

[44] Caesars argues that the trial court's exclusion of arbitration decisions, relating to the incident that ultimately triggered Costa's termination, was an abuse of discretion so prejudicial that a new trial is warranted. The incident that led to Costa's termination was the altercation with Gerber in the elevator. In an arbitration brought pursuant to their collective bargaining agreement, both Costa and Gerber challenged the discipline imposed, to no avail. At the discrimination trial, having successfully argued that hearsay rules blocked Costa's attempt to introduce transcripts of the arbitration hearing, Caesars later sought to introduce the arbitrator's decisions. Costa responded by raising a hearsay objection and arguing that admission of the decisions would be irrelevant because the central issue of the trial-sex discrimination-was not addressed in the arbitration.

Costa is correct that discrimination was not covered by the collective bargaining agreement and was not at issue in the arbitration. Thus, the present case can be distinguished from *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 38, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), in which the Supreme Court established an employee's right to pursue both Title VII judicial remedies and arbitration "under the nondiscrimination clause of a collective-bargaining agreement." Because we review for abuse of discretion the narrow evidentiary issue before us, we need not address the scope of *Gardner-Denver* or broader issues with respect to the preclusive effects of arbitration on subsequent discrimination claims. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 35, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991). Other courts have held that district courts have discretion to exclude arbitration awards in similar circumstances. *See, e.g. Jackson v. Bunge Corp.,* 40 F.3d 239, 246 (7th Cir.1994); *McAlester v. United Air Lines, Inc.,* 851 F.2d 1249, 1259 (10th Cir.1988); *Perry v. Larson,* 794 F.2d 279, 284-85 (7th Cir.1986). Under these circumstances, it was not an abuse of discretion for the district court to exclude the arbitration decisions. *See United States v. Hernandez-Herrera,* 273 F.3d 1213, 1217 (9th Cir.2001) (standard of review).

IV. PUNITIVE DAMAGES

The jury awarded $100,000 in punitive damages, in addition to the $200,000 in ***864** compensatory damages (later remitted to $100,000) and $64,377.74 in backpay. Caesars argues that the jury instruction on punitive damages, though a proper statement of Ninth Circuit law at the time of trial, was in fact in error under the Supreme Court's later ruling in *Kolstad v. American Dental Association,* 527 U.S. 526, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999). We agree and accordingly remand for consideration of punitive damages.

We have explained that *Kolstad* provided the employer with a new "good faith" defense, enabling it to escape punitive damages if it can show that the challenged actions were not taken by senior managers and were contrary to the employer's good faith implementation of an effective antidiscrimination policy. *Swinton,* 270 F.3d at 810-11; *Passantino v. Johnson & Johnson Consumer Prods., Inc.,* 212 F.3d 493, 516 (9th Cir.2000). *Kolstad* also suggests that " 'the court should review the type of authority that the employer has given to the employee, the amount of discretion that the employee has in what is done and how it is accomplished.' " 527 U.S. at 543, 119 S.Ct. 2118 (quoting 1 L. Schlueter & K. Redden, Punitive Damages § 4.4(B)(2)(a), p. 181 (3d ed.1995)). Understandably, in view of the then-current Ninth Circuit authority, the instructions here contained no such considerations, nor were these issues considered by the district court.[10]

[45] **[46]** Initially, we must determine whether Caesars waived the objection to the form of the instruction by failing to raise it at trial. We have discretion to review an instruction despite such a failure to object where a " 'solid wall of Circuit authority' would have rendered an objection futile." *Knapp v. Ernst & Whinney,* 90 F.3d 1431, 1438-39 (9th Cir.1996) (quoting *Robinson v. Heilman,* 563 F.2d 1304, 1307 (9th Cir.1977) (per curiam)). Consistent with our prior cases in this transitional period, we believe that review is appropriate to determine whether the jury instructions comported with the Supreme Court's command in *Kolstad. See Winarto v. Toshiba Am. Elecs. Components, Inc.,* 274 F.3d 1276, 1291 (9th Cir.2001); *Swinton,* 270 F.3d at 809-10; *Passantino,* 212 F.3d at 514.

[47] Both parties seek to avoid a remand on the punitive damages issue. Costa argues that the jury's finding of egregious conduct obviates the need to determine good faith; Caesars argues that punitive damages are unavailable as a matter of law. Neither argument prevails. The jury found the conduct "egregious" or reflective ***865** of "complete indifference to the safety and rights of others." *Kolstad* held that "egregious" misconduct was probative but not necessary for an award of punitive damages. 527 U.S. at 538, 119 S.Ct. 2118. Instead, the question was the employer's "malice" or "reckless indifference" to the employee's federally protected rights. *Id.* at 535-36, 119 S.Ct. 2118. The jury's findings, which were well-supported, establish this requisite scienter and the additional, probative factor of egregious misconduct. However, we cannot equate "egregious" misconduct with a lack of "good faith" as a matter of law. Nor can we say that punitive damages are unavailable as a matter of law. We therefore remand for a retrial on the issue of punitive damages in light of *Kolstad.*

AFFIRMED in part; **REVERSED** and **REMANDED** in part. Each party to bear its own costs on appeal.

GOULD, Circuit Judge, with whom KOZINSKI, FERNANDEZ, and KLEINFELD, Circuit Judges, join, dissenting:

I respectfully dissent because the majority does not follow the Supreme Court's holding in *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), in Title VII mixed motives cases. The majority's analysis is not persuasive and should be corrected because it disregards the holding of *Hopkins* that is reflected in Justice O'Connor's concurring opinion.

In *Hopkins,* the plurality, comprised of four Justices, concluded that an employee should be able to recover under Title VII if gender was "a factor in the employment decision at the moment it was made," *id.* at 241, 109 S.Ct. 1775, unless the employer, using objective evidence, could show by a preponderance of the evidence that it would have made the same decision absent the discriminatory motive. *Id.* at 244-45, 252, 109 S.Ct. 1775.

Justice White, joined by Justice O'Connor, concurred in the judgment. Justice White thought that the impermissible motive must have been a "substantial factor" in the employer's decision and that the employer need not use "objective evidence" to make its same-decision showing. *Id.* at 259, 261, 109 S.Ct. 1775. Justice White would permit a mixed motive test in which the burden is shifted to the employer, but he would be liberal on the evidence an employer could offer. His view of when such a test should be available, however, is broader than Justice O'Connor's.

Justice O'Connor would allow a plaintiff to use a mixed motive test only in narrow circumstances. In concurrence, Justice O'Connor held that she would require a Title VII plaintiff in a mixed motive case to produce "direct evidence" showing that "decisionmakers placed substantial negative reliance on [the] illegitimate criterion," *id.* at 277, 109 S.Ct. 1775.

I do not point to Justice O'Connor's concurring opinion merely to admire its common sense, though that is admirable. Rather, we must heed the direct evidence rule of *Hopkins* as controlling, and we may not diminish it, in the majority's terms, as a "passing reference." Justice O'Connor's concurring opinion in *Hopkins,* which in considered language required the use of direct evidence to prove a mixed motive case, must be viewed as the holding of the Court, under the rule of *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds ***866** ....") (citation and internal quotation marks omitted).

Because Justice O'Connor would permit the use of the mixed motives test only when direct evidence is present, Justice O'Connor "concurred in the judgment on the narrowest grounds," *see Marks* 430 U.S. at 193, 97 S.Ct. 990, and her concurrence is to be considered the holding of *Hopkins* under the rule described in *Marks.* The view that Justice O'Connor's opinion is the holding in *Hopkins* is supported by Congress' actions in amending Title VII in 1991, by the holdings of other circuits on the issue, and by sound policy.

The 1991 amendments to Title VII did not modify the Supreme Court's prior holding on the need for direct evidence. Subsection (m) of 42 U.S.C. § 2000e-2, which incorporates the premise of *Hopkins* that discrimination can be shown in a mixed motive case so long as it is one factor, was enacted two years after *Hopkins:*

> Except as otherwise provided in this subchapter [42 U.S.C. §§ 2000e *et seq.*], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m). Though Congress responded to other aspects of the Court's holding in *Hopkins,* specifically the holding that an employer could completely avoid liability if it could show that it would have made the same decision absent the discriminatory motive, *see* 42 U.S.C. § 2000e-5(g)(2); *Fuller v. Phipps,* 67 F.3d 1137, 1142 (4th Cir.1995), Congress, in amending Title VII, did not respond at all to Justice O'Connor's direct evidence requirement, which had already been adopted by several circuit courts. Instead, the statutory amendments are silent as to that subject, neither praising nor condemning, neither adopting nor rejecting, and clearly not modifying Justice O'Connor's test, which is properly viewed as the holding of *Hopkins.* This silence indicates that Congress left undisturbed Justice O'Connor's holding and the prior circuit decisions that adhered to it. As we remain bound by the Supreme Court's precedent, we must follow the direct evidence rule as explained in Justice O'Connor's concurrence.

By vitiating Justice O'Connor's direct evidence requirement, the majority's holding puts our circuit in conflict with almost all others. *See Jackson v. Harvard Univ.,* 900 F.2d 464, 467 (1st Cir.1990); *Ostrowski v. Atl. Mut. Ins. Cos.,* 968 F.2d 171, 182 (2d Cir.1992); *Starceski v. Westinghouse Elec. Corp.,* 54 F.3d 1089, 1096 (3d Cir.1995); *Fuller v. Phipps,* 67 F.3d 1137, 1142 (4th Cir.1995); *Brown v. E. Miss. Elec. Power Ass'n,* 989 F.2d 858, 861 (5th Cir.1993); *Wilson v. Firestone Tire & Rubber Co.,* 932 F.2d 510, 514 (6th Cir.1991); *Plair v. E.J. Brach & Sons, Inc.,* 105 F.3d 343, 347 (7th Cir.1997); *Schleiniger v. Des Moines Water Works,* 925 F.2d 1100, 1101 (8th Cir.1991); *Heim v. Utah,* 8 F.3d 1541, 1547 (10th Cir.1993); *E.E.O.C. v. Alton Packaging Corp.,* 901 F.2d 920, 923 (11th Cir.1990). As suggested in the decision of the three-judge panel in *Costa,* and as reflected in the cases cited above, these circuits have correctly viewed Justice O'Connor's opinion in *Hopkins* as the holding of the Court and have followed it on that basis. *See Costa v. Desert Palace, Inc.,* 268 F.3d 882, 886-88 (9th Cir.2001), *vacated by* 274 F.3d 1306 (9th Cir.2001). I agree with the other circuits and with the reasoning of the prior opinion of the three-judge panel in *Costa,* which I adopt because it is faithful to precedent.1 We ***867** should not rush to join a decision that turns its back on our colleagues' wisdom and engages our circuit in a fanciful frolic of its own.

Finally, apart from our duty to abide by precedent, policy concerns favor adhering to Justice O'Connor's view of mixed motives analysis. Mixed motives analysis is a departure from the well-established *McDonnell Douglas* framework. Whereas *McDonnell Douglas* requires the plaintiff to make a pretext showing once an employer puts forth evidence of legitimate nondiscriminatory reasons for the challenged employment practice, mixed motive analysis allows a plaintiff to prevail even when she cannot prove pretext.

To keep the mixed motive framework from overriding in all cases the *McDonnell Douglas* rule and the pretext requirement, which it clearly was not meant to do, mixed motive analysis properly is available only in a special subset of cases. Justice O'Connor's direct evidence requirement meets this need: It requires the plaintiff to produce highly probative, direct evidence, before she may utilize the more lenient, mixed motives test. As a practical matter, without this or some similar constraint on when a plaintiff may invoke the mixed motives test, any plaintiff would opt for the *Hopkins* framework to avoid having to show pretext. The Supreme Court's seminal opinion in *McDonnell Douglas* would be effectively overruled by an incorrect interpretation of *Hopkins* that jettisons the direct evidence requirement, an effect that could not have been intended in *Hopkins* and an effect that will create uncertainty in our settled law.

Taken with the idea that plaintiff, an unsatisfactory employee, is a "trailblazer," the majority departs from the path of precedent and blazes its own trail beyond the frontiers of settled law into regions of error. I respectfully dissent.

Parallel Citations

89 Fair Empl.Prac.Cas. (BNA) 673, 83 Empl. Prac. Dec. P 41,122, 59 Fed. R. Evid. Serv. 542, 02 Cal. Daily Op. Serv. 6959, 2002 Daily Journal D.A.R. 8738

Footnotes

1 *Costa v. Desert Palace, Inc.*, 268 F.3d 882 (9th Cir.2001), *reh'g en banc granted*, 274 F.3d 1306 (9th Cir.2001).

2 For a thorough analysis concluding that the legislative history is unhelpful on the "direct evidence" requirement, see Benjamin C. Mizer, Note, *Toward a Motivating Factor Test for Individual Disparate Treatment Claims*, 100 Mich. L.Rev. 234, 256-60 (2001).

3 We view this categorization of Ninth Circuit law as misplaced. The case cited in *Fernandes, Lambert v. Ackerley*, 180 F.3d 997, 1008-09 (9th Cir.1999) (en banc), does not adopt the "animus plus" approach.

4 The general rule bears repeating: in proving a case, circumstantial evidence "is weighed on the same scale and laid before the jury in the same manner as direct evidence." *United States v. King*, 552 F.2d 833, 845 (9th Cir.1976) (citing *Holland v. United States*, 348 U.S. 121, 139-40, 75 S.Ct. 127, 99 L.Ed. 150 (1954)). In other words, "circumstantial evidence is not inherently less probative than direct evidence." *United States v. Cruz*, 536 F.2d 1264, 1266 (9th Cir.1976) (citation and internal quotation marks omitted).

5 This may be done by showing "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817.

6 The presumption is thus what has been termed a "bursting bubble" presumption. In one limited circumstance, the presumption retains vitality at trial: where there is no rebuttal by the employer, but the plaintiff's prima facie case is in factual dispute. The jury then determines whether the prima facie case is established. If it is, the jury must find discrimination. *Hicks*, 509 U.S. at 509-10, 113 S.Ct. 2742.

7 As the Supreme Court has observed, a case need not be characterized or labeled at the outset. Rather, the shape will often emerge after discovery or even at trial. Similarly, the complaint itself need not contain more than the allegation that the adverse employment action was taken because of a protected characteristic. *See Price Waterhouse*, 490 U.S. at 247 n. 12, 109 S.Ct. 1775 (plurality opinion).

8 Although Justice White used the term "pretext cases" in the first sentence of this passage, it is clear from the context that he was referring to single-motive cases, including those involving pretext. *Id.* at 260, 109 S.Ct. 1775.

9 *See Galloway v. Gen'l Motors Serv. Parts Operations*, 78 F.3d 1164, 1168 (7th Cir.1996) (holding that the legal meaning of the word "bitch" is context-specific; "The word 'bitch' is sometimes used as a label for women who possess such 'woman faults' as 'ill-temper ...,' and latterly as a label for women considered by some men to be too aggressive or careerist." (citation omitted)), *overruled in part on other grounds by Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002); *Kriss v. Sprint Communications Co.*, 58 F.3d 1276, 1281 (8th Cir.1995) (noting that use of the word "bitch" might be evidence of discrimination in some contexts); *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1513 (D.C.Cir.1995) ("[T]his pejorative term may support an inference that an employment decision is discriminatory under different circumstances ....").

10 Caesars objected to Instruction Number 15, which was a general vicarious liability instruction:

> A corporation such as Caesars Palace acts through its management and it is responsible for the decisions and actions of its management and supervisory personnel in matters of this kind.

Instruction Number 13 related to punitive damages and read, in relevant part:

> If you find for plaintiff and if you award compensatory damages or nominal damages, you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish a defendant and to deter a defendant and others from committing similar acts in the future.
>
> Plaintiff has the burden of proving that punitive damages should be awarded, and the amount, by a preponderance of the evidence. You may award punitive damages only if you find that Plaintiff has made a showing beyond the threshold level of intent required for compensatory damages. An award of punitive damages is proper where defendant's illegal acts were willful and egregious, or displayed reckless disregard to plaintiff's rights. Conduct is in reckless disregard of plaintiff's rights if, under the circumstances, it reflects complete indifference to the safety and rights of others.

1 The three-judge panel held that:

> Even if Costa's evidence of differential treatment were found to raise an inference of discrimination, it does not "prove that her gender played a motivating part in an employment decision." *Price Waterhouse*, 490 U.S. at 258, 109 S.Ct. 1775, 104 L.Ed.2d 268 (plurality opinion); *see also id.* at 280, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (O'Connor, J., concurring) ("I read [today's decision] as establishing that in a limited number of cases Title VII plaintiffs, by presenting direct and substantial evidence of discriminatory animus, may shift the burden of persuasion to the defendant to show that an adverse employment decision would have been supported by legitimate reasons."). Costa's case comes down to the fact that she was the only woman

in her workplace and that in some instances she was treated less favorably than her male coworkers. But she has failed to produce evidence that she was treated differently *because* she was a woman-"direct and substantial evidence of discriminatory animus." Accordingly, the district court erred in giving the jury a mixed-motive instruction. Because the court's instructions shifted the burden of proof to Caesars, the error was not harmless. *See Caballero v. City of Concord,* 956 F.2d 204, 206 (9th Cir.1992). Caesars was prejudiced, moreover, by the court's instruction that the jury had "heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex," a statement not supported by the record. Accordingly, the judgment must be vacated.

Costa, 268 F.3d at 889-90 (footnotes omitted).

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148 Idaho 391
Supreme Court of Idaho,
Boise, September 2008 Term.

Mary C. CURLEE, Plaintiff-Appellant,
v.
KOOTENAI COUNTY FIRE & RESCUE,
Defendant-Respondent.

No. 34460. | Oct. 16, 2008.

Synopsis

Background: Former county fire and rescue employee brought whistleblower action upon her discharge following discovery of her notes detailing minute-by-minute activities of two co-workers. The District Court, First Judicial District, Kootenai County, John T. Mitchell, J., entered summary judgment in favor of fire and rescue. The Court of Appeals, 2007 WL 1501383, affirmed.

Holdings: The Supreme Court, Horton, J., held that:
[1] as a matter of first impression, *McDonnell Douglas* burden-shifting analysis is applicable at trial in cases involving claims raised under state whistleblower act;
[2] fact question as to whether fire and rescue's stated reason for termination was pretextual precluded summary judgment;
[3] fact question as to whether employee's notes constituted a "communication" protected by whistleblower statute precluded summary judgment, even though notes were never presented to employee's supervisors;
[4] fact question as to whether employee acted in "good faith" precluded summary judgment, even though employee sought to gain personally from reporting waste, and her notes referred to coworkers by disparaging nicknames; and
[5] fact question as to whether employee was participating in an "investigation" precluded summary judgment, even though employee's note-taking was not part of an official inquiry.

Reversed and remanded.

West Headnotes (21)

[1] Appeal and Error
Scope of Inquiry in General

While Supreme Court gives serious consideration to the views of the Court of Appeals when considering a case on review from that court, Supreme Court reviews the district court's decision directly.

[2] Appeal and Error
Cases Triable in Appellate Court

Supreme Court reviews an appeal from an order of summary judgment de novo, and Supreme Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment.

3 Cases that cite this headnote

[3] Judgment
Presumptions and burden of proof

When ruling on a motion for summary judgment, disputed facts are construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party.

2 Cases that cite this headnote

[4] Judgment
Presumptions and burden of proof
Judgment
Showing to be made on opposing affidavit

Adverse party may not rest upon mere allegations in the pleadings to survive motion for summary judgment, but must set forth by affidavit specific facts showing there is a genuine issue for trial. Rules Civ.Proc., Rule 56(e).

1 Cases that cite this headnote

[5] **Officers and Public Employees**
Presumptions and burden of proof

McDonnell Douglas burden-shifting analysis applicable to employment discrimination claims is applicable at trial in cases involving claims raised under state whistleblower act; however, burden-shifting framework does not apply at summary judgment stage. West's I.C.A. § 6-2101 et seq.

[6] **Courts**
Validity and construction of Constitutions and statutes of other states

When confronted with matters of first impression involving state statutes, Supreme Court may glean insight from the interpretations of sister states concerning similar or identical statutes; while the construction of a statute by another state may be persuasive, it is not conclusive and the Court may refuse to adopt the foreign construction.

1 Cases that cite this headnote

[7] **Officers and Public Employees**
Presumptions and burden of proof

When the *McDonnell Douglas* analysis is applied to cases involving retaliatory discharge under a whistleblower statute, the test is as follows: (1) the plaintiff must establish a prima facie case of retaliatory conduct for an action protected by the relevant whistleblower statute; (2) once the plaintiff demonstrates a prima facie case, the defendant is obligated to produce evidence which, if taken as true, would permit the conclusion that there was a non-retaliatory reason for the adverse action; and (3) if the defendant articulates a legitimate non-retaliatory reason for discharge, then the burden shifts to the plaintiff to prove by a preponderance of the evidence that the reason the defendant offers is a pretext for retaliatory conduct. West's I.C.A. § 6-2101 et seq.

1 Cases that cite this headnote

[8] **Judgment**
Public officers and employees, cases involving

Genuine issue of material fact as to whether county fire and rescue's stated reason for terminating employee was pretextual precluded summary judgment in favor of fire and rescue in employee's action alleging violation of whistleblower statute. West's I.C.A. § 6-2101 et seq.

[9] **Officers and Public Employees**
Presumptions and burden of proof

Although there must be something more than pure speculation or conjecture, circumstantial evidence may provide an inference of causation in action under whistleblower act; proximity in time between the protected activity and the adverse employment action is particularly significant. West's I.C.A. § 6-2101 et seq.
1 Cases that cite this headnote

[10] **Appeal and Error**
Scope and theory of case

Appellate court reviewing grant of summary judgment may affirm the trial court on a theory not relied upon below.

2 Cases that cite this headnote

[11] **Appeal and Error**
Review Dependent on Whether Questions Are of Law or of Fact

The interpretation of a statute is a question of law over which Supreme Court exercises free review.

[12] **Statutes**
Literal and grammatical interpretation

Interpretation of a statute begins with an examination of the statute's literal words.

[13] **Statutes**
Existence of ambiguity

Where the language of a statute is plain and unambiguous, courts give effect to the statute as written, without engaging in statutory construction.

1 Cases that cite this headnote

[14] **Statutes**
Existence of ambiguity

Only where statutory language is ambiguous will courts look to rules of construction for guidance and consider the reasonableness of proposed interpretations.

1 Cases that cite this headnote

[15] **Statutes**
Meaning of Language

Unless a contrary purpose is clearly indicated, ordinary words will be given their ordinary meaning when construing a statute.

1 Cases that cite this headnote

[16] **Statutes**
Intention of Legislature
Statutes
Policy and purpose of act
Statutes
Statute as a Whole, and Intrinsic Aids to Construction
Statutes
Giving effect to entire statute

In construing a statute, Supreme Court will not deal in any subtle refinements of the legislation, but will ascertain and give effect to the purpose and intent of the legislature, based on the whole act and every word therein, lending substance and meaning to the provisions.

[17] **Judgment**
Public officers and employees, cases involving

Genuine issue of material fact as to whether employee's keeping of notes, detailing the allegedly wasteful activities of her coworkers, constituted a "report," and thus a "communication" protected by whistleblower statute precluded summary judgment in favor of county fire and rescue in employee's action alleging violation of whistleblower statute. West's I.C.A. §§ 6-2103(2), 6-2104(1)(a).

1 Cases that cite this headnote

[18] **Judgment**
Public officers and employees, cases involving

Genuine issue of material fact as to whether employee of county fire and rescue acted in "good faith" in recording the allegedly wasteful activities of her coworkers precluded summary judgment in favor of fire and rescue in employee's action alleging violation of whistleblower statute, even though employee sought to gain personally from reporting waste, and her notes referred to coworkers by disparaging nicknames. West's I.C.A. § 6-2104(1)(b).

[19] **Officers and Public Employees**
Grounds for removal

Although it may fall into the overall consideration of whether public employee acted in good faith, the fact that employee was hoping to gain personally from reporting coworkers' impropriety would not foreclose a finding that her actions were protected by state whistleblower act. West's I.C.A. § 6-2104(1)(b).

[20] **Judgment**
Public officers and employees, cases involving

Genuine issue of material fact as to whether employee of county fire and rescue was participating in an "investigation" when recording the allegedly wasteful activities of her coworkers precluded summary judgment in favor of fire and rescue in employee's action alleging violation of whistleblower statute. West's I.C.A. § 6-2104(2).

[21] **Officers and Public Employees**
Grounds for removal

An "investigation," within meaning of state whistleblower statute, is not limited to an official inquiry, but encompasses actions involving close examination or observation. West's I.C.A. § 6-2104(2).

Attorneys and Law Firms

**460 Rude, Jackson & Daugharty, LLP, Coeur d'Alene, for appellant.

Ramsden & Lyons, Coeur d'Alene, for respondent.

Opinion

HORTON, Justice.

*393 Appellant Mary C. Curlee (Curlee), a former employee of Respondent Kootenai County Fire and Rescue (KCFR), was discharged on October 13, 2004, after her notes detailing the minute-by-minute activities of two of her coworkers, Jackie Sharp (Sharp) and Lisa Wheeler (Wheeler), to whom she assigned the fictitious names "Muffy" and "Buffy," were discovered by Sharp on Curlee's desk. Curlee filed suit against KCFR, alleging that she was fired in violation of the Idaho Protection of Public Employees Act as her notes documented the waste of public funds, property, or manpower. The district court granted summary judgment in favor of KCFR and Curlee appealed. The Court of Appeals affirmed the district court's grant of summary judgment. This Court granted review *sua sponte*. We vacate the district court's grant of summary judgment and remand for proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Beginning in 1999, Curlee held several office positions within the KCFR system. In 2002, Curlee was transferred into the administrative offices of KCFR. When Curlee arrived, Wheeler and Sharp were already working there as a bookkeeper and an administrative assistant, respectively. Initially, Curlee performed data entry duties; she was later assigned to the front-desk receptionist position. While in her data entry position, Curlee became displeased with what she considered to be an inordinate amount of time Wheeler and Sharp spent on personal conversations during the workday. Curlee perceived the actions as wasteful and complained to the Fire Chief, Ronald Sampert. When she complained to Chief Sampert about Wheeler and Sharp's behavior, Curlee also suggested that she be moved from the receptionist position to a more important position and that the office could be run by two, not three, employees.

After being reassigned to the receptionist position, Curlee was in direct daily contact with Wheeler and Sharp. Growing more frustrated with the actions of her coworkers, Curlee eventually voiced her concerns to two fire commissioners, two lieutenants, and the deputy chief. Each of these individuals listened to her complaints. The deputy chief and one of the lieutenants informed Curlee they would discuss her concerns with Chief Sampert. Curlee claims that both of the lieutenants told her she should document the behavior of her coworkers that she

believed to be wasteful.

Over the course of the next several months, Curlee maintained a detailed, handwritten, minute-by-minute log of the activities engaged in by her two coworkers which Curlee deemed to be wasteful. During this time period, Curlee again expressed her frustration to Chief Sampert. In response, he expressed a desire to ease the tension in the office and to have all of his employees work together. One of the fire commissioners told Curlee that he and another commissioner ***394 **461** were "working on" Curlee's concerns. Curlee did not discuss or disclose the contents of her log during these conversations or at any other time to any employee of KCFR.

Approximately seven months after Curlee began keeping her log, Sharp inadvertently discovered the log when she was attending the front desk during Curlee's lunch break. Sharp showed the log to Wheeler. Both women noticed that, within the log, Curlee had frequently referred to them as "Muffy" and "Buffy" rather than by their names. Wheeler and Sharp made photocopies of the log and submitted them to Chief Sampert. Both women were angry that Curlee had been recording their office activities and felt that being referred to as "Muffy" and "Buffy" was derogatory and insulting. Chief Sampert agreed to speak with Curlee about the log.

Chief Sampert, accompanied by the deputy chief, spoke with Curlee about the log. When asked what she meant to accomplish by keeping the log, Curlee responded that everyone in the office wasted too much time and she wanted to show how much. Curlee also informed Chief Sampert that she could document anything she wanted to. Chief Sampert informed Curlee that her coworkers were upset and insulted by the derogatory names she had used and that all offices had wasted time. Chief Sampert advised Curlee that she was not trying to get along with the others and that her behavior was exacerbating office tension. He indicated that he was trying to build a team, and her actions were detrimental to the team. Curlee advised Chief Sampert that she and the two coworkers would never be a team. Chief Sampert gave Curlee the remainder of the day off as paid leave and asked her to go home and develop a solution to ease the workplace tension.

Curlee returned to work the next day. Chief Sampert asked her if she had thought about the problem and what they might do about it. Curlee responded that she did not know what to do, that she would not apologize, and that she had done nothing wrong. When Chief Sampert discussed the importance of not creating dissension in the office and working together, Curlee responded that it was her coworkers who found the log and gave it to him. Curlee reiterated that she would not apologize and would never be able to have a good working relationship with her two coworkers. Her employment was then terminated.

Curlee filed suit against KCFR, alleging that she was wrongfully terminated in violation of the Idaho Protection of Public Employees Act for documenting a waste of public funds and manpower. KCFR answered Curlee's complaint, denied the allegations, and moved for summary judgment. KCFR moved to strike an affidavit submitted by Curlee from Suzanne Johnson, a former KCFR employee who had worked with Sharp prior to Curlee's transfer into the administrative office. The district court granted the motion to strike and granted KCFR's motion for summary judgment. Curlee filed a motion to reconsider, which the district court denied.

II. STANDARD OF REVIEW

[1] [2] [3] [4] "While this Court gives serious consideration to the views of the Court of Appeals when considering a case on review from that court, this Court reviews the district court's decision directly." *Hauschulz v. State,* 144 Idaho 834, 837, 172 P.3d 1109, 1112 (2007) (citing *Workman v. State,* 144 Idaho 518, 522, 164 P.3d 798, 802 (2007)). This Court reviews an appeal from an order of summary judgment *de novo,* and this Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment. *Lockheed Martin Corp. v. Idaho State Tax Comm'n,* 142 Idaho 790, 793, 134 P.3d 641, 644 (2006). When ruling on a motion for summary judgment, disputed facts are construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party. *Lockheed Martin,* 142 Idaho at 793, 134 P.3d at 644. "Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* "I.R.C.P. 56(e) provides that the adverse ***395 **462** party may not rest upon mere allegations in the pleadings, but must set forth by affidavit specific facts showing there is a genuine issue for trial." *Rhodehouse v. Stutts,* 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994).

III. ANALYSIS

Curlee claims that she was discharged in violation of the Idaho Protection of Public Employees Act, I.C. § 6-2101 *et seq.* (the Act), which is commonly referred to as a

"whistleblower act." The Act "seeks to 'protect the integrity of government by providing a legal cause of action for public employees who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation.' " *Mallonee v. State,* 139 Idaho 615, 619, 84 P.3d 551, 555 (2004) (quoting I.C. § 6-2101). On appeal, Curlee asserts three points of error: first, she asserts it was error to grant summary judgment to KCFR; second, she asserts it was error to strike Suzanne Johnson's affidavit; and third, she asserts it was error to deny her motion to reconsider, alter, or amend. On appeal, KCFR raises the issue of whether the district court's grant of summary judgment can be affirmed under a different legal theory, namely that Curlee's actions were not protected by the Act. We consider these issues below.

A. The district court erred by granting summary judgment to KCFR.

The primary issue in this case is whether the district court erred in granting summary judgment in favor of KCFR. Curlee's principal argument is that the district court's grant of summary judgment in favor of KCFR was improper because the district court did not evaluate the evidence in accordance with proper standards for deciding summary judgment motions. Specifically, Curlee argues that the district court usurped the function of the jury by making findings of fact and drawing inferences from the evidence in favor of KCFR, rather than determining whether she demonstrated the existence of a genuine issue of material fact.

The district court ruled on KCFR's motion for summary judgment from the bench, holding that Curlee had failed to demonstrate a causal connection between her keeping of the log and her termination. The district court noted that, although Curlee had presented evidence that she may have been terminated for a reason protected by the Act (her keeping of the log), KCFR presented evidence of a legitimate reason for her discharge (her refusal to follow Chief Sampert's order to take measures to resolve the tension she had created with her coworkers by using the names Muffy and Buffy in her log). The district court stated that, once KCFR presented a legitimate reason for her termination, the burden shifted back to Curlee to "poke holes" in KCFR's rationale for her termination. The district court held that Curlee had not carried her burden of producing evidence that showed a genuine issue of material fact as to whether she was discharged for any reason other than her refusal to work productively with her coworkers.

[5] Although the district court did not specifically identify the basis for its ruling, it appears that the burden-shifting standard that it applied is derived from *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), a U.S. Supreme Court case involving employment discrimination, and its progeny.1 A summary of the *McDonnell Douglas* burden-shifting analysis is as follows: (1) once a plaintiff produces evidence that she suffered from an adverse discriminatory employment decision; then (2) the burden shifts to the employer to produce evidence that the employment decision was based on a legitimate reason; and then (3) the burden shifts back to the plaintiff to prove that the legitimate non-discriminatory reason the employer proffers is in fact a pretext. *Id.* The *McDonnell Douglas* analysis has been applied widely by federal and state courts (including this Court) faced with employment discrimination ***396 **463** cases. *See e.g. Bowles v. Keating,* 100 Idaho 808, 812-14, 606 P.2d 458, 462-64 (1979); *Hoppe v. McDonald,* 103 Idaho 33, 36, 644 P.2d 355, 358 (1982). However, this Court has yet to extend the *McDonnell Douglas* analysis to apply to cases of retaliatory discharge under Idaho's whistleblower act.

[6] Some sister states and federal courts have applied the *McDonnell Douglas* analysis in cases involving unlawful discharge for actions protected under whistleblower statutes similar to Idaho's. *See e.g. LaFond v. General Physics Serv. Corp.,* 50 F.3d 165, 172 (2d Cir.1995) (addressing the application of the *McDonnell Douglas* three-part test to the Connecticut whistleblower statute); *Stevens v. St. Louis Univ. Med. Ctr.,* 831 F.Supp. 737, 741 (E.D.Mo.1993) (applying *McDonnell Douglas* standards in the absence of state case law identifying the elements of a whistleblower claim under Missouri law); *Rosen v. Transx Ltd.,* 816 F.Supp. 1364, 1369-70 (D.Minn.1993) (analyzing Minnesota's whistleblower statute under the *McDonnell Douglas* test). When confronted with matters of first impression involving Idaho statutes, this Court may glean insight from the interpretations of sister states concerning similar or identical statutes. *See e.g. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Ada County,* 123 Idaho 410, 418, 849 P.2d 83, 91 (1993); *Ada County Assessor v. Roman Catholic Diocese of Boise,* 123 Idaho 425, 431, 849 P.2d 98, 104 (1993). However, while the construction of a statute by another state may be persuasive, it is not conclusive and we may refuse to adopt the foreign construction. *Mochel v. Cleveland,* 51 Idaho 468, 480, 5 P.2d 549, 553 (1930). We find the decisions of our sister states to be well-reasoned and conclude that the *McDonnell Douglas* analysis should be applied to actions arising under Idaho's whistleblower act.

[7] When the *McDonnell Douglas* analysis is applied to cases involving retaliatory discharge under a whistleblower statute, the test is as follows: (1) the plaintiff

must establish a prima facie case of retaliatory conduct for an action protected by the relevant whistleblower statute; (2) once the plaintiff demonstrates a prima facie case, the defendant is obligated to produce evidence which, if taken as true, would permit the conclusion that there was a non-retaliatory reason for the adverse action; and (3) if the defendant articulates a legitimate non-retaliatory reason for discharge, then the burden shifts to the plaintiff to prove by a preponderance of the evidence that the reason the defendant offers is a pretext for retaliatory conduct. *LaFond,* 50 F.3d at 173.

While other courts have found the *McDonnell Douglas* framework useful in approaching cases under state whistleblower statutes, those courts have also noted that the "burden-shifting rule of *McDonnell Douglas,* however, has little or no application at the summary judgment stage. The rule explicitly governs the burden of persuasion at trial." *Heng v. Rotech Med. Corp.,* 688 N.W.2d 389, 401 (N.D.2004) (construing North Dakota's whistleblower statute); *see also LaFond,* 50 F.3d at 174. We find this foreign jurisprudence well-reasoned. Accordingly, we conclude that the district court erroneously held Curlee to a higher burden of proof than is permissible at summary judgment by requiring her to "poke holes" in KCFR's proffered rationale for discharging her and to demonstrate that the grounds advanced as justification for her termination were a pretext for retaliatory conduct. While this burden-shifting analysis is applicable at trial, it was error for the district court to apply it at the summary judgment stage.

[8] The role of the trial court at the summary judgment stage is limited to discerning whether there are any genuine issues of material fact to be tried. *LaFond* 50 F.3d at 174. It does not extend to deciding them. *Id.* Therefore, in order to survive summary judgment, Curlee only had the burden of presenting evidence from which a rational inference of retaliatory discharge under the whistleblower act could be drawn. *Id.* If Curlee presented a prima facie case of retaliatory discharge, the district court was not free to accept as true the employer's testimony that she was fired for some other legitimate reason. *Id.* We conclude that the district court erred by accepting KCFR's justification for discharging Curlee and requiring ***397 **464** her to show that the justification was, in fact, a pretext.

[9] We find that Curlee presented a prima facie case of retaliatory discharge. The close relation in time between the discovery of her documentation of her coworkers' waste and her termination supports the reasonable inference that Curlee was discharged for that documentation. "Although there must be something more than pure speculation or conjecture, circumstantial evidence may provide an inference of causation. Proximity in time between the protected activity and the adverse employment action is 'particularly significant.' " *Heng,* 688 N.W.2d at 399 (internal citation omitted). We recognize that a jury may well decide that KCFR did not discharge Curlee in retaliation for her documentation of waste. However, that determination properly belongs to the jury at trial and not the judge at the summary judgment stage. For that reason, we vacate the district court's order granting summary judgment in favor of KCFR.

B. Genuine issues of material fact remain as to whether Curlee was fired for conduct protected under the whistleblower statute.

[10] On appeal, KCFR advances the alternative argument that summary judgment was appropriate because Curlee failed to establish that her conduct fell under the protection of the Act. This issue was not addressed by the district court. However, the appellate court may affirm the trial court on a theory not relied upon below. *McCuskey v. Canyon County,* 123 Idaho 657, 663, 851 P.2d 953, 959 (1993) (citing *Andre v. Morrow,* 106 Idaho 455, 459, 680 P.2d 1355, 1359 (1984)). Thus, we consider the issue herein.

Under Idaho's whistleblower act, a prima facie case for retaliatory discharge requires Curlee to show: (1) she was an "employee" that engaged or intended to engage in protected activity; (2) her "employer" took adverse action against her, and (3) the existence of a causal connection between the protected activity and the employer's adverse action. I.C. §§ 6-2104 & 6-2105(4); *see also Dahlberg v. Lutheran Social Services of North Dakota,* 625 N.W.2d 241, 253 (N.D.2001) (identifying the elements of a prima facie case under North Dakota's whistleblower statute); *Calvit v. Minneapolis Pub. Sch.,* 122 F.3d 1112, 1118 (8th Cir.1997) (articulating the elements of a prima facie case under Minnesota's whistleblower statute). There is no question that, as defined by the Act, Curlee is an "employee," KCFR is an "employer," and that discharge constitutes "adverse action." I.C. § 6-2103. As we concluded in Part III(A), *supra,* Curlee has met her summary judgment burden of demonstrating that there is a genuine issue of material fact as to whether her discharge was causally related to her maintaining the log of her coworkers' conduct. The only remaining question is whether there is a genuine issue of material fact as to whether Curlee's conduct in maintaining the log was "protected activity."

KCFR argues that Curlee's actions are not protected activities under I.C. § 6-2104 because (1) she did not communicate in good faith the existence of any waste of public funds, property or manpower, which is protected

activity under I.C. § 6-2104(1)(a); and (2) she did not participate or give information in an investigation, hearing, court proceeding, legislative or other inquiry, or other form of administrative review, which is protected activity under I.C. § 6-2104(2). We disagree.

An employee's cause of action under the whistleblower act is defined in I.C. § 6-2105(4):

> To prevail in an action brought under the authority of this section, the employee shall establish, by a preponderance of the evidence, that the employee has suffered an adverse action because the employee, or a person acting on his behalf engaged or intended to engage in an activity protected under section 6-2104, Idaho Code.

KCFR's position is based primarily on its interpretation of specific words in the whistleblower act, which provides:

> (1)(a) An employer may not take adverse action against an employee because the employee, or a person authorized to act on behalf of the employee, ***communicates*** in good faith the existence of any waste of ***398 **465** public funds, property or manpower, or a violation or suspected violation of a law, rule or regulation adopted under the law of this state, a political subdivision of this state or the United States. Such communication shall be made at a time and in a manner which gives the employer reasonable opportunity to correct the waste or violation.
>
> (b) For purposes of subsection (1)(a) of this section, an employee communicates in good faith if there is a reasonable basis in fact for the communication. Good faith is lacking where the employee knew or reasonably ought to have known that the report is malicious, false or frivolous.
>
> (2) An employer may not take adverse action against an employee because an employee participates or gives information in an ***investigation,*** hearing, court proceeding, legislative or other inquiry, or other form of administrative review.
>
> (3) An employer may not take adverse action against an employee because the employee has objected to or refused to carry out a directive that the employee reasonably believes violates a law or a rule or regulation adopted under the authority of the laws of this state, political subdivision of this state or the United States.
>
> (4) An employer may not implement rules or policies that unreasonably restrict an employee's ability to document the existence of any waste of public funds, property or manpower, or a violation, or suspected violation of any laws, rules or regulations.

I.C. § 6-2104 (emphasis added).

[11] [12] [13] [14] [15] [16] Our standard of review for statutory interpretation is well established:

> The interpretation of a statute is a question of law over which this Court exercises free review. *State v. Hart,* 135 Idaho 827, 829, 25 P.3d 850, 852 (2001). Interpretation of a statute begins with an examination of the statute's literal words. *State v. Burnight,* 132 Idaho 654, 659, 978 P.2d 214, 219 (1999). Where the language of a statute is plain and unambiguous, courts give effect to the statute as written, without engaging in statutory construction. *State v. Rhode,* 133 Idaho 459, 462, 988 P.2d 685, 688 (1999). Only where the language is ambiguous will this Court look to rules of construction for guidance and consider the reasonableness of proposed interpretations. *Albee v. Judy,* 136 Idaho 226, 231, 31 P.3d 248, 253 (2001).

Idaho Conservation League, Inc. v. Idaho State Dep't of Agric., 143 Idaho 366, 368, 146 P.3d 632, 634 (2006). "Moreover, unless a contrary purpose is clearly indicated, ordinary words will be given their ordinary meaning when construing a statute." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints,* 123 Idaho at 415, 849 P.2d at 88 (citing *Bunt v. City of Garden City,* 118 Idaho 427, 430, 797 P.2d 135, 138 (1990)). In construing a statute, this Court will not deal in any subtle refinements of the legislation, but will ascertain and give effect to the purpose and intent of the legislature, based on the whole act and every word therein, lending substance and meaning to the provisions. *George W. Watkins Family v. Messenger,* 118 Idaho 537, 539-40, 797 P.2d 1385, 1387-88 (1990).

1. *"Communication" of waste*

[17] KCFR argues that Curlee's actions fall outside the protection of the Act because they were not a "communication." Idaho Code § 6-2104(1)(a) specifically provides:

> An employer may not take adverse action

> against an employee because the employee ... ***communicates in good faith*** the existence of any waste of public funds, property or manpower.... Such communication shall be made at a time and in a manner which gives the employer reasonable opportunity to correct the waste or violation.

(emphasis added). The statute defines "communicate" as "a verbal or written report." I.C. § 6-2103(2). The statute does not, however, define "report." The dictionary definition of "report" is to "give an account of." *Delgado v. Jim Wells County,* 82 S.W.3d 640, 642 (Tex.Ct.App.2002) (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1990) to construe the ordinary meaning of "report" under Texas's whistleblower statute).

****466 *399** KCFR argues that, while the documentation was written, there was no evidence that Curlee prepared the documentation as a written report or ever intended to submit it to her supervisors. KCFR posits that Curlee failed to establish that she was keeping these notes as part of a report or that she ever intended to pass them along to a supervisor. KCFR points out that it was her coworkers that inadvertently discovered the notes that Curlee kept in secret and that when Curlee was questioned about them by Chief Sampert she merely stated that she could keep them if she wanted to. Therefore, KCFR asserts that her notes were not a communication protected by the whistleblower act. We are not persuaded by this argument.

It was not necessary that Curlee actually have presented the notes to her employer in order to constitute a report. Idaho's whistleblower act only requires that the employee "***intended*** to engage in an action protected under the act." I.C. § 6-2105(4) (emphasis added). Curlee presented evidence that her supervisors instructed her to document the waste. By way of affidavit, she testified she "began documenting the things in the office to support the fact that there was waste of manpower and mismanagement in the office" and that her "notes were part of the communication of such wastefulness of manpower and public funds in the office." A reasonable inference may be drawn that she intended to deliver the report to her supervisors at some future time, but that action was preempted by the inadvertent discovery of her notes by Sharp. Indeed, it appears that the district judge drew this inference, as he stated that "it seems to me from my reading of what is admissible the Plaintiff was assembling information that she felt reported waste...." We conclude that KCFR is not entitled to summary judgment in its favor on this ground.

[18] KCFR argues in the alternative that Curlee's actions are not protected under the Act because the notes were not kept in "good faith." The statute defines good faith as follows: "an employee communicates in good faith if there is a reasonable basis in fact for the communication. ***Good faith is lacking where the employee knew or reasonably ought to have known that the report is malicious,*** false or frivolous." I.C. § 6-2104(1)(b) (emphasis added). KCFR argues that that the reports were malicious because the attribution of the names "Muffy" and "Buffy" to Wheeler and Sharp was disparaging.

The statute does not define malice. The dictionary defines malicious as: "harboring ill will or enmity ... proceeding from hatred or ill will ... playfully or archly mischievous ... [c]lever, cunning ... having or done with, wicked or mischievous intentions or motives ... [i]ll-disposed, spiteful, resentful, bitter, rancorous, sinister, unpropitious." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1367 (1966). It is clear from the record that Curlee disliked Wheeler and Sharp and resented working with them. Other courts have held that animosity between the discharged employee and the subjects of their reports compromises any finding that the employee's complaints were made in "good faith" as defined by whistleblower law. *Cipriani v. Lycoming County Housing Auth.,* 177 F.Supp.2d 303, 331 (M.D.Pa.2001) (discussing the requirement of good faith under Pennsylvania's whistleblower statute).

KCFR points to *Baird v. Cutler,* 883 F.Supp. 591 (D.Utah 1995), a case under the Utah whistleblower act, where it was stated: "Discipline for failure to abide by reasonable established procedures, or for rudeness or incivility, even when it occurs in connection with 'whistleblowing,' does not constitute a violation of the 'Whistleblower Act.' " *Id.* at 606. KCFR argues that even if Curlee's log was a communication that reported waste, her actions nonetheless fell outside of the protection of the statute because they were not made in good faith, and that her incivility was the true reason for her discharge.

[19] From the factual averments contained in the affidavits, it could be inferred that when Curlee initially approached Chief Sampert about the wastefulness of Wheeler and Sharp she had ulterior motives of personal gain and promotion. Some courts have required that "we must not look only at the contents of the report, but also at the reporter's purpose in making the report." *Dahlberg,* ***400 **467** 625 N.W.2d at 254. For instance, the whistleblower statutes of some states require that, as an element of good faith, the employee not take the actions for personal gain or consideration. *See e.g. Cipriani,* 177 F.Supp.2d at 331; *Albright v. City of Philadelphia,* 399 F.Supp.2d 575, 595-96 (E.D.Pa.2005). However, the Idaho whistleblower act does not contain similar language. Therefore, although it may fall into the overall

consideration of whether she acted in good faith or not, the fact that Curlee was hoping to gain personally from reporting the waste of Wheeler and Sharp does not foreclose a finding that her actions were protected by the Idaho whistleblower act.

Curlee claims that she used the names Muffy and Buffy because Wheeler and Sharp reminded her of characters from a movie. Whether an employee has made a report in good faith is a question of fact, and summary judgment is appropriate only if, after viewing the evidence in the light most favorable to Curlee, reasonable minds could only conclude that her use of the names Muffy and Buffy was indeed malicious. We conclude that the question whether Curlee's usage of the names Muffy and Buffy shows that the report was malicious is an issue of fact to be decided by a jury and not by this Court on appeal.

2. *Participation in an "investigation"*

[20] [21] Idaho Code § 6-2104(2) provides: "An employer may not take adverse action against an employee because an employee participates or gives information in an ***investigation,*** hearing, court proceeding, legislative or other inquiry, or other form of administrative review." (emphasis added). Curlee argues that she was participating in an investigation of the wasteful activities of her coworkers. In support of this claim, she asserts that two lieutenants told her to document waste after she informed them of Wheeler's and Sharp's conduct. KCFR asserts that "[p]articipation or giving information in an investigation, hearing, court proceeding, legislative or other inquiry or other form of administrative review requires more than simply documenting alleged wasteful activities by co-workers" and that Curlee "did not show the trial court that she was participating or giving information in any investigation or other form of administrative review."

The word "investigate" is not defined in the statute. Therefore, we must give it its plain meaning. An ordinary dictionary defines "investigate" as follows: "to track ... to observe or study by close examination and systematic inquiry ... to make a systematic examination; ***esp*** : to conduct an official inquiry." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 616 (10th ed.1993) (emphasis added). The legal dictionary of first resort defines the word as follows: "to follow up step by step by patient inquiry or observation ... to examine and inquire into with care and accuracy; to find out by careful inquisition; examination...." BLACK'S LAW DICTIONARY 740 (5th ed.1979). Although the word "investigation" may be narrowly defined as an official inquiry, we conclude that the plain meaning of the word is broader and encompasses actions involving close examination or observation. In view of the evidence that Curlee's note-taking was the product of her superiors' direction to "document" her allegations of waste, we conclude that there is a genuine issue of material fact as to whether she intended to give information in an investigation.

C. The remaining issues need not be addressed by this Court on appeal.

Curlee asserts that the district court erred by striking Suzanne Johnson's affidavit and by denying her motion to reconsider, alter, or amend. Because we have concluded that the district court erred by granting KCFR's motion for summary judgment, it is not necessary to address whether the district court erred by striking Johnson's affidavit and denying Curlee's motion to reconsider, alter, or amend.

IV. CONCLUSION

We vacate the district court's order granting summary judgment in favor of KCFR. The case is remanded to the district court for further proceedings consistent with this opinion. Costs are awarded to Curlee.

***401** ****468** Chief Justice EISMANN and Justices BURDICK, J. JONES and W. JONES concur.

Parallel Citations

224 P.3d 458, 28 IER Cases 529

Footnotes

1 Although the district court did not mention *McDonnell Douglas* specifically, KCFR argues in its supplemental brief that "Under the *McDonnell Douglas* framework, the burden shifted to Curlee to demonstrate that KCFR's alleged reason for the adverse employment decision was a pretext for another motive which was in violation of the statute. This Curlee has failed to do."

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303 F.3d 994
United States Court of Appeals, Ninth Circuit.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellee,
v.
LUCE, FORWARD, HAMILTON, & SCRIPPS, Defendant-Appellant.
Equal Employment Opportunity Commission, Plaintiff-Appellant,
v.
Luce, Forward, Hamilton, & Scripps, Defendant-Appellee.

Nos. 00-57222, 01-55321. | Argued and Submitted April 1, 2002. | Filed Sept. 3, 2002.

Equal Employment Opportunity Commission (EEOC) sued employer under Title VII and other statutes, alleging that employer retaliated against employee by requiring him to sign arbitration agreement as condition of employment. The United States District Court for the Central District of California, Florence Marie Cooper, J., 122 F.Supp.2d 1080, enjoined employer from requiring arbitration as condition of employment and from enforcing existing arbitration agreements. Employer appealed. The Court of Appeals, Trott, Circuit Judge, held that: (1) an employer may require employees to arbitrate Title VII claims as a condition of employment, abrogating *Circuit City Stores v. Banyasz, Melton v. Philip Morris, Inc., Ferguson v. Countrywide Credit Indus., Inc.*; (2) applicant's refusal to sign compulsory arbitration agreement was not opposition to unlawful employment practice, so as to be protected conduct for purposes of retaliation claim; and (3) applicant's refusal to sign compulsory arbitration agreement was not participation in statutorily authorized proceeding, so as to be protected conduct for purposes of retaliation claim.

Vacated and remanded.

Pregerson, Circuit Judge, dissented and filed opinion.

West Headnotes (9)

[1] **Alternative Dispute Resolution**
Validity

An employer may require employees to arbitrate Title VII claims as a condition of employment; abrogating *Circuit City Stores v. Banyasz,* No. C-01-3106 WHO; *Melton v. Philip Morris, Inc.,* 2001 WL 1105046; *Ferguson v. Countrywide Credit Indus., Inc.,* No. CV00-13096AHM(CTX). Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
1 Cases that cite this headnote

[2] **Alternative Dispute Resolution**
Unconscionability

Not all agreements requiring arbitration of Title VII claims as a condition of employment will be enforced; they must still comply with the principles of traditional contract law, including the doctrine of unconscionability. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
1 Cases that cite this headnote

[3] **Alternative Dispute Resolution**
Validity

Employer could require appropriate compulsory arbitration of Title VII claims of its applicants and employees as condition of employment, and could enforce those arbitration agreements against current employees, as long as agreements complied with traditional principles of contract law. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
5 Cases that cite this headnote

[4] **Civil Rights**
Practices Prohibited or Required in General; Elements
Labor and Employment
Wages and Hours

To establish retaliation under Title VII, ADA, ADEA, or EPA, Equal Employment Opportunity Commission (EEOC) was required to prove that:

(1) applicant engaged in protected activity; (2) applicant suffered adverse employment decision; and (3) there was causal link between applicant's activity and adverse employment decision. Fair Labor Standards Act of 1938, § 15(a)(3), 29 U.S.C.A. § 215(a)(3); Age Discrimination in Employment Act of 1967, § 4(d), 29 U.S.C.A. § 623(d); Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a); Americans with Disabilities Act of 1990, § 503(a), 42 U.S.C.A. § 12203(a).

7 Cases that cite this headnote

[5] **Civil Rights**
Activities Protected
Labor and Employment
Protected Activities

Protected activities, for purposes of a retaliation action under Title VII, the ADA, ADEA, or the EPA, include: (1) opposing an unlawful employment practice, and (2) participating in a statutorily authorized proceeding. Fair Labor Standards Act of 1938, § 15(a)(3), 29 U.S.C.A. § 215(a)(3); Age Discrimination in Employment Act of 1967, § 4(d), 29 U.S.C.A. § 623(d); Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a); Americans with Disabilities Act of 1990, § 503(a), 42 U.S.C.A. § 12203(a).

3 Cases that cite this headnote

[6] **Civil Rights**
Activities Protected

Applicant's refusal to sign agreement requiring him, as condition of employment, to arbitrate Title VII claims, was not opposition to unlawful employment practice, so as to be protected conduct for purposes of retaliation claim, inasmuch as voluminous legal precedent was to the contrary, and employee could not have reasonably interpreted text of any relevant federal statute to forbid compulsory arbitration. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

4 Cases that cite this headnote

[7] **Civil Rights**
Activities Protected

It is not necessary that the policy opposed by an employee be demonstrably unlawful for the opposition to be protected conduct for purposes of a Title VII retaliation claim; if the employee's refusal to accede to an employer's policy is based on a reasonable belief that the policy is unlawful, the employee's conduct is a protected manner of opposition. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

7 Cases that cite this headnote

[8] **Civil Rights**
Activities Protected

Applicant's refusal to sign agreement requiring him, as condition of employment, to arbitrate Title VII claims, was not participation in statutorily authorized proceeding, so as to be protected conduct for purposes of retaliation claim; although Equal Employment Opportunity Commission (EEOC) argued that employee reserved right to bring action in judicial forum, no federal law guaranteed him ability to vindicate that right in federal forum. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

[9] **Civil Rights**
Activities Protected
Labor and Employment
Protected Activities

The protections against retaliation found in Title VII, the ADA, the ADEA, and the EPA extend to an applicant or an employee who informs his employer of his intention to participate in a statutory proceeding, even if he has not yet done so. Fair Labor Standards Act of 1938, § 15(a)(3), 29 U.S.C.A. § 215(a)(3); Age Discrimination in Employment Act of 1967, § 4(d), 29 U.S.C.A. §

623(d); Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a); Americans with Disabilities Act of 1990, § 503(a), 42 U.S.C.A. § 12203(a).

2 Cases that cite this headnote

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Appeal from the United States District Court for the Central District of California; Florence Marie Cooper, District Judge, Presiding. D.C. No. CV-00-01322-FMC.
Before PREGERSON and TROTT, Circuit Judges, and FITZGERALD, District Judge.*

Opinion

OPINION

TROTT, Circuit Judge.

The law firm Luce, Forward, Hamilton & Scripps LLP ("Luce Forward") refused to hire Donald Scott Lagatree ("Lagatree") as a full-time legal secretary because he would not sign an agreement to ***997** arbitrate claims arising from his employment. On behalf of Lagatree, the Equal Employment Opportunity Commission ("EEOC") sued Luce Forward for retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3, the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12203(b), the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623(d), and the Equal Pay Act of 1963 ("EPA"), 29 U.S.C. § 215(a)(3). The EEOC sought make-whole relief for Lagatree and a permanent injunction forbidding Luce Forward from requiring that employees sign arbitration agreements as a condition of employment.

The district court refused to award make-whole relief and rejected EEOC's request for an injunction based on the ADA, the ADEA, or the EPA. Relying on *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir.1998), however, the district court enjoined Luce Forward from requiring applicants to arbitrate Title VII claims and from enforcing existing agreements to arbitrate those claims.

We have jurisdiction over Luce Forward's timely appeal pursuant to 28 U.S.C. § 1291. In *Circuit City Stores v. Adams,* 532 U.S. 105, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001), the Supreme Court implicitly overruled *Duffield.* Accordingly, we reverse the district court and hold that employers may require employees to sign agreements to arbitrate Title VII claims as a condition of their employment. We vacate the district court's permanent injunction against Luce Forward, which relied exclusively on *Duffield* for the contrary proposition. We additionally reject the EEOC's retaliation theory. Lagatree did not engage in a protected activity when he refused to sign the Luce Forward arbitration agreement, and consequently, Luce Forward did not retaliate by refusing to hire him.

BACKGROUND

Lagatree applied for a position as a full-time legal secretary with Luce Forward in September 1997. Impressed with Lagatree's credentials and experience, Luce Forward extended to him a conditional offer of employment. On his first day of work, Luce Forward presented Lagatree with its standard offer letter, which set forth the terms and conditions of employment. The letter specified Lagatree's salary and benefits. His employment was at-will; "either [he] or the firm [could] terminate [his] employment at any time, with or without cause." The offer letter also included an arbitration provision requiring Lagatree to submit all "claims arising from or related to his employment" to binding arbitration. In its entirety, the Luce Forward arbitration agreement provided:

> In the event of any dispute or claim between you and the firm (including employees, partners, agents, successors and assigns), including but not limited to claims arising from or related to your employment or the termination of your employment, we jointly agree to submit all such disputes or claims to confidential binding arbitration, under the Federal Arbitration Act. Any arbitration must be initiated within 180 days after the dispute or claim first arose, and will be heard before a retired State or Federal judge in the county containing the firm office in

> which you were last employed. The law of the State in which you last worked will apply.

Lagatree objected to the arbitration provision. He told Deborah Sweeney ("Sweeney"), a Luce Forward personnel employee, that he "couldn't sign ... the arbitration agreement" because "it was unfair." In his deposition, Lagatree clarified that he would not sign an arbitration agreement under an at-will employment situation because he believed he needed to ***998** keep in place his "civil liberties, including the right to a jury trial and redress of grievances through the government process." Sweeney then went to discuss the matter with Raymond W. Berry ("Berry"), the director of human resources at Luce Forward.

Lagatree worked for Luce Forward for two days without a contract while Luce Forward considered his vigorous objection to the arbitration provision. After those two days, Lagatree met with Berry and Sweeney. Lagatree asked whether Luce Forward "could strike" the arbitration provision from the offer letter. Berry responded that the arbitration agreement was a non-negotiable condition of employment at Luce Forward, and "if [Lagatree] didn't agree to ... signing that clause, then he would not be an employee of the firm." When Lagatree expressed his belief that "he didn't feel that it was right," Berry again "told him that[signing the arbitration provision] was the only way that he could stay-or become an employee of the firm." Initially, Lagatree agreed to sign the arbitration provision, but a short time later Lagatree refused to do so, and consequently, Luce Forward withdrew its job offer. It is undisputed that Luce Forward refused to hire Lagatree only because he would not sign the arbitration provision.

In February 1998, Lagatree sued Luce Forward in Los Angeles Superior Court accusing Luce Forward of wrongfully terminating his employment. Lagatree sought lost wages, damages for emotional distress, and punitive damages. The Superior Court granted Luce Forward's motion to dismiss, holding that Luce Forward did not unlawfully discharge Lagatree when he refused to sign a predispute arbitration agreement as a condition of employment. A California Court of Appeal affirmed, and the California Supreme Court denied review. *Lagatree v. Luce, Forward, Hamilton & Scripps,* 74 Cal.App.4th 1105, 88 Cal.Rptr.2d 664 (1999), *review denied* 2000 Cal. LEXIS 262, at *1 (Cal.2000).

While his state court suit was pending, Lagatree filed a complaint with the EEOC, alleging that he was wrongfully terminated for refusing to sign the Luce Forward arbitration provision. The EEOC sued Luce Forward on behalf of Lagatree and in the public interest, arguing that (1) *Duffield* forbade Luce Forward from requiring Lagatree to sign an arbitration agreement, and (2) by refusing to hire Lagatree, Luce Forward unlawfully retaliated against him for asserting his constitutional right to a jury trial. The EEOC sought make-whole relief for Lagatree, including "rightful place employment," back wages and benefits, and compensatory and punitive damages. The EEOC sought also a permanent injunction forbidding Luce Forward from engaging in unlawful retaliation and ordering Luce Forward to "desist from utilizing mandatory arbitration agreements."

The district court denied any award of damages on behalf of Lagatree. Considering itself bound by *Duffield,* however, the district court felt it was "required to issue an injunction prohibiting [Luce Forward] from requiring its employees to agree to arbitrate their Title VII claims as a condition of employment and from attempting to enforce any such previously executed agreements." The district court did not issue an injunction forbidding compulsory arbitration of ADA, ADEA or EPA claims. Nor did the district court expressly rule on the EEOC's retaliation theory. Luce Forward timely appealed the district court's injunction. The EEOC cross-appealed, seeking to enjoin Luce Forward from engaging in an "unlawful retaliatory practice by denying employment to any applicant ... who refuses to waive his right to participate ***999** in statutorily protected [ ] proceedings."

STANDARD OF REVIEW

We review de novo the district court's grant of summary judgment. *Lopez v. Smith,* 203 F.3d 1122, 1131 (9th Cir.2000) (en banc).

DISCUSSION

I *DUFFIELD*

An employer may not discriminate against "an employee or applicant for employment because of such individual's race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a)(1) (Title VII), "disability," 42 U.S.C. § 12112(a)(ADA), or "age." 42 U.S.C. § 623(a)(1) (ADEA). The EPA makes it unlawful to pay lower wages on the basis of an employee's sex. 29 U.S.C. § 206(d)(1).

The Civil Rights Act of 1991 ("the Act") strengthened Title VII by making it easier to bring and to prove lawsuits and by expanding the available judicial remedies so that plaintiffs could receive full compensation for injuries resulting from discrimination. H.R. Rep. No. 102-40(I), at

30 (1991), *reprinted in* 1991 U.S.S.C.A.N. 694, 694-96. The Act also included a "polite bow to the popularity of alternative dispute resolution," as governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16. *Pryner v. Tractor Supply Co.,* 109 F.3d 354, 363 (7th Cir.1997). Specifically, § 118 of the Act provided that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including ... arbitration is encouraged to resolve disputes arising under this chapter." Pub. L. No. 102-166, 105 Stat. 1071 § 118 *reprinted in* notes to 42 U.S.C. § 1981 ("Section 118"); *Cf.* 42 U.S.C. § 12212 ("Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including ... arbitration is encouraged to resolve disputes arising under this chapter.").

Congress passed § 118 against the backdrop of the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991). In that case, the Court held that an employer could compel arbitration of an employee's ADEA claim pursuant to an arbitration provision required as a condition of his employment. The Court recognized that arbitration did not hinder the discrimination plaintiff's ability to vindicate her rights: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral forum, rather than a judicial forum." *Gilmer,* 500 U.S. at 26, 111 S.Ct. 1647 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)).1 By this language, the Court judicially sanctioned the liberal federal policy favoring arbitration.

Despite the Supreme Court's decision in *Gilmer* and Congress's seemingly perspicuous language that § 118 encourages arbitration, we determined in *Duffield* that ***1000** Congress intended to exempt Title VII claims from compulsory arbitration. 144 F.3d at 1185. In *Duffield,* Robertson Stephens required Tonya Duffield, "like every other individual who wishes to work in the United States as a broker-dealer in the securities industry, to agree to arbitrate all disputes arising from her employment." *Id.* Duffield signed her employment contract without objection and began working as a broker-dealer for Robertson Stephens. *Id.* at 1186.

Duffield subsequently sued Robertson Stephens for sexual discrimination and sexual harassment in violation of Title VII and California's Fair Employment & Housing Act ("FEHA"). Robertson Stephens sought to compel arbitration pursuant to the compulsory arbitration provision in Duffield's employment contract, while Duffield sought a declaration that the compulsory arbitration provision was unenforceable. The district court rejected Duffield's arguments and granted Robertson Stephen's motion to compel.

On appeal, we reversed the district court's order compelling arbitration. The opening paragraph of our opinion succinctly presented the issue for review: "[W]hether employers may require as a mandatory condition of employment ... that all employees waive their right to bring Title VII and other statutory and non-statutory claims in court and instead agree in advance to submit all employment-related disputes to binding arbitration." *Id.* at 1185. We believed that the answer to this question was potentially dispositive of whether Robertson Stephens could enforce the compulsory arbitration agreement signed by Duffield. As we approached the case: (1) if Robertson Stephens could not require Duffield to sign an arbitration agreement as a condition of her employment, it surely could not enforce the agreement against her; whereas (2) if Robertson Stephens could require Duffield to sign an arbitration agreement as a condition of her employment, that agreement might be enforceable subject to the constraints of traditional contract law. *See, e.g., First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) ("apply[ing] ordinary statelaw principles that govern the formation of contracts" determining the validity of an agreement to arbitrate); *Ferguson v. Countrywide Credit Indus.,* 298 F.3d 778, 784-85 (9th Cir.2002) (refusing compulsory arbitration of Title VII claims where arbitration agreement was unconscionable); *Circuit City Stores, Inc. v. Najd,* 294 F.3d 1104, 1108 (9th Cir.2002) (allowing arbitration); *Circuit City Stores v. Ahmed,* 283 F.3d 1198, 1199 (9th Cir.2002) (allowing compulsory arbitration of FEHA claims where agreement was not unconscionable); *Prudential Ins. Co. v. Lai,* 42 F.3d 1299, 1305 (9th Cir.1994) (refusing compulsory arbitration where plaintiff did not knowingly agree to arbitrate).

At the outset of *Duffield,* we observed that reading § 118 to allow compulsory arbitration of Title VII claims was "at odds with" Congress's directive that Title VII be read broadly to effectuate its remedial purposes. 144 F.3d at 1192. We thought it "at least a mild paradox" that the Act, which expanded remedies for victims of discrimination, encouraged the use of a process whereby employers condition employment on their prospective employees' surrendering of their rights to a judicial forum. *Id.* at 1192-93 (quoting *Pryner,* 109 F.3d at 363). These observations established the opinion's foundation.

Building on this foundation, the Court undertook an exercise in statutory interpretation, commencing with an examination of § 118's plain language. The *Duffield* Court determined that, in context, Congress's pronouncement in

§ 118 that "arbitration is encouraged to resolve disputes ***1001** arising under [Title VII]" was ambiguous "at a minimum." *Duffield,* 144 F.3d at 1193. To clarify this ambiguity, the Court turned to § 118's legislative history. After picking and choosing snippets of legislative history consistent with its desired result, which the dissent sets forth "at some length," the Court concluded that § 118 codified the law as it was understood before *Gilmer*-that employers could not compel prospective employees to forego their right to litigate Title VII claims in a judicial forum as a condition of employment. *Id.* at 1199. Accordingly, the *Duffield* Court held that "under the Civil Rights Act of 1991, employers may not [through compulsory arbitration agreements] compel individuals to waive their Title VII right to a judicial forum." *Id.* at 1185. As Robertson Stephens could not require Duffield to sign an arbitration agreement as a condition of her employment, the Court refused to enforce the arbitration agreement that she signed. *Id.* at 1199 ("In view of the fact that the context, language, and legislative history of the 1991 Act together make out a conclusive case, that Congress intended to preclude compulsory arbitration of Title VII claims, we think it inescapable that [Duffield's arbitration agreement] is unenforceable as applied to such claims.").

Those seeking to distinguish *Duffield* assert that it addressed only whether an employer may *enforce* compulsory arbitration of Title VII claims against its employees. *See Weeks v. Harden Mfg. Corp.,* 291 F.3d 1307, 1315 (11th Cir.2002) ("[*Duffield*] ... stand[s] for the proposition that compulsory arbitration agreements are 'unenforceable' or are 'inconsistent' with Title VII."); *Borg-Warner Protective Servs. Corp. v. EEOC,* 245 F.3d 831, 835 (D.C.Cir.2001) ("*Duffield* ruled only that such agreements are 'unenforceable' with respect to Title VII claims."). We respectfully disagree with these narrow assessments. The *Duffield* Court decided whether an employer could require compulsory arbitration as a condition of employment-a question it believed dispositive of the entire case. The latter portions of *Duffield* which *concluded* that the arbitration agreement was unenforceable simply express the inevitable consequence of holding that employers may not require arbitration of Title VII claims as a condition of employment. *See, e.g., id.* at 1199. ("The contract before us [ ] requires compulsory arbitration ... and it is contracts of that nature we are compelled to hold unenforceable....").

While *Duffield* properly considered whether an employer could require that an employee sign a compulsory arbitration agreement as a condition of employment, arguably its outcome was at odds with existing Circuit authority. In *Mago v. Shearson Lehman Hutton Inc.,* 956 F.2d 932, 935 (9th Cir.1992), we held that Congress did not intend to preclude arbitration of Title VII claims. The *Mago* Court extended *Gilmer* to Title VII claims, finding probative the similarities between the ADEA and Title VII. *Id. Mago,* however, did not interpret (or even mention) § 118, even though *Mago* was decided months after its passage.

Later in *Lai,* we observed: "*Gilmer* ... made it clear that the ADEA does not bar agreements to arbitrate federal age discrimination in employment claims. *Our Circuit has extended Gilmer to employment discrimination claims brought under Title VII.*" *Lai,* 42 F.3d at 1303 (citing *Mago*) (emphasis added); *see also id.* ("The issue before us, however, is not whether employees may ever agree to arbitrate statutory employment claims; they can."). *Lai* discussed § 118, and contrary to *Duffield,* concluded that Congress intended to allow arbitration of Title VII claims "where the parties knowingly and voluntarily elect to use these methods." ***1002** 42 F.3d at 1304-05 (citing H.R.Rep. No. 102-40(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 635 (statement of Sen. Dole)). Although *Duffield* cited both *Mago* and *Lai,* it did not address these decisions' express statements that *Gilmer* and § 118 authorized compulsory arbitration of Title VII claims.

Since our *Duffield* decision in 1998, our Sister Circuits as well as the Supreme Courts of California and Nevada have unanimously repudiated its holding. *See, e.g., Desiderio v. Nat'l Assoc. of Sec. Dealers, Inc.,* 191 F.3d 198, 206 (2d Cir.1999) (referring to *Duffield's* reasoning as "the poet's lament"); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 170 F.3d 1, 7 (1st Cir.1999); *Koveleskie v. SBC Capital Mkts., Inc.,* 167 F.3d 361, 365 (7th Cir.1999) ("We respectfully disagree with the Ninth Circuit on this issue ...."); *Seus v. John Nuveen & Co.,* 146 F.3d 175, 182 (3d Cir.1998); *Patterson v. Tenet Healthcare, Inc.,* 113 F.3d 832, 837 (8th Cir.1997); *Cole v. Burns Int'l Sec. Servs.,* 105 F.3d 1465, 1482-83 (D.C.Cir.1997); *Austin v. Owens-Brockway Glass Container, Inc.,* 78 F.3d 875, 882 (4th Cir.1996); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 39 F.3d 1482, 1487 (10th Cir.1994); *Bender v. A.G. Edwards & Sons, Inc.,* 971 F.2d 698, 700 (11th Cir.1992); *Alford,* 939 F.2d at 230; *Willis v. Dean Witter Reynolds, Inc.,* 948 F.2d 305, 307 (6th Cir.1991); *see also Armendariz v. Foundation Health Psychcare Servs.,* 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669, 675-76 (2000) ("Aside from the fact *Duffield* is a minority of one, we find its reasoning unpersuasive."); *Kindred v. Second Judicial Dist.,* 116 Nev. 405, 996 P.2d 903, 906 (2000). *Duffield,* like Bikini Atoll, now sits ignominiously alone awaiting remediation.

That remediation can occur, however, only if a decision of the Supreme Court permits us to question *Duffield. See United States v. Gay,* 967 F.2d 322, 327 (9th Cir.1992)

("As a general rule, one three-judge panel of this court cannot reconsider or overrule the decision of a prior panel. An exception to this rule arises when an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit ....") (internal citations and quotations omitted). In *Circuit City,* the Supreme Court so directly undermined the reasoning behind *Duffield,* that we conclude it has lost its status as valid precedent.

In *Circuit City,* the Supreme Court reviewed our decision in *Craft v. Campbell Soup Co.,* 177 F.3d 1083 (9th Cir.1998) (per curiam), in which we held that the FAA was not applicable to any contract of employment. The Supreme Court disagreed with *Craft's* conclusion, clarifying that the FAA covered all employment contracts except those of transportation workers. *Circuit City,* 532 U.S. at 119, 121 S.Ct. 1302. In the process, the Court described the "real benefits to the enforcement of arbitration provisions," including lower costs and easy choice-of-law resolution, and it rejected "the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." *Id.* at 122-23, 121 S.Ct. 1302. Most importantly, the Court believed it had "been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law ...; by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Id.*

Although *Circuit City* did not repudiate *Duffield* by name, the Supreme Court's language and reasoning decimated *Duffield's* conclusion that Congress intended ***1003** to preclude compulsory arbitration of Title VII claims. In particular, *Circuit City's* unambiguous proclamation that "arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law" cannot be reconciled with *Duffield's* holding that Congress intended Title VII, one such "congressional enactment," to preclude compulsory arbitration of discrimination claims.[2] *Circuit City,* 532 U.S. at 122-23, 121 S.Ct. 1302.

Similarly, the Supreme Court's emphatic reminder that the right to a judicial forum is not a substantive right contradicts *Duffield's* fundamental supposition that the Act guaranteed a nonwaivable, substantive right to a jury trial.[3] *Compare Circuit City,* 532 U.S. at 122-23, 121 S.Ct. 1302 ("[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by statute; it only submits to their resolution in an arbitral, rather than a judicial forum.") *with Duffield,* 144 F.3d at 1185 ("[U]nder the Civil Rights Act of 1991, employers may not [through compulsory arbitration agreements] compel individuals to waive their *Title VII right to a judicial forum.*") (emphasis added). In effect, *Circuit City* recognized that an aggrieved employee does not lose anything by resolving his grievances in an arbitral forum, where he may demand the "specific protection" against discrimination afforded by federal law, including Title VII. *Circuit City,* 532 U.S. at 123, 121 S.Ct. 1302.

[1] [2] Instead of trying to salvage *Duffield* by creatively reconciling these inconsistencies as "different" yet "compatible holdings," we reach the inevitable conclusion that *Duffield* no longer remains good law.[4] We regard *Duffield* as within the ***1004** category of "fruitful error."[5] In *Duffield's* stead, we hold that an employer may require employees to arbitrate Title VII claims as a condition of employment. Our decision is consistent with the Supreme Court's language and reasoning in *Circuit City.* It also unifies Ninth Circuit case law and brings us in line with our Sister Circuits and the Supreme Courts of California and Nevada. We note also that it is consistent with Congress's pronouncement in § 118 that "arbitration is encouraged to resolve disputes arising under [Title VII]."[6] Of course, not all compulsory arbitration agreements will be enforced; they must still comply with the principles of traditional contract law, including the doctrine of unconscionability.

Our decision today should not impact the EEOC's mission at all. As the Supreme Court recently explained in *EEOC v. Waffle House, Inc.,* 534 U.S. 279, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002), a compulsory arbitration agreement between an employer and an employee does not prevent the employee from filing a complaint with the EEOC. Nor does such an agreement bind the EEOC to an arbitral forum because the EEOC is not a party to that agreement. *Id.* Thus, even if an employee must arbitrate her Title VII claims pursuant to a compulsory arbitration agreement, the EEOC, in its ombudsman's role, remains free to seek appropriate victim-specific relief in any suitable forum. *Id.* at 769.

[3] Without further ado, we vacate the district court's *Duffield*-based permanent injunction. Compelled by the Supreme Court's decision in *Circuit City,* we conclude that *Duffield* no longer remains good law. Luce Forward may require appropriate compulsory arbitration of its applicants and employees as a condition of employment. In addition, Luce Forward may enforce those arbitration agreements against current employees, *as long as* the arbitration agreements comply with traditional principles of contract law.

II *RETALIATION*

Although the EEOC asserts that *Circuit City* did not implicitly overrule *Duffield* and that *Duffield* remains the law of the Circuit, the EEOC, nevertheless, does not place all its eggs in *Duffield's* basket. In fact, the EEOC primarily argues that Luce Forward unlawfully retaliated against Lagatree by not hiring him after he refused to sign Luce Forward's compulsory arbitration agreement.

[4] **[5]** The federal laws prohibiting employment discrimination make it unlawful for an employer to retaliate against an applicant or employee because she has engaged in a protected activity. *See* 42 U.S.C. § 2000e-3(a) (Title VII);7 ***1005** 42 U.S.C. § 12203(a)(ADA); 29 U.S.C. § 623(d) (ADEA); 29 U.S.C. § 215(a)(3)(EPA). To establish retaliation, the EEOC, on Lagatree's behalf, must prove that: (1) Lagatree engaged in a protected activity; (2) Lagatree suffered an adverse employment decision; and (3) there was a causal link between Lagatree's activity and the adverse employment decision. *See Hashimoto v. Dalton,* 118 F.3d 671, 679 (9th Cir.1997). Protected activities include: (1) opposing an unlawful employment practice; and (2) participating in a statutorily authorized proceeding. *Silver v. KCA, Inc.,* 586 F.2d 138, 141 (9th Cir.1978).

In this case, it is undisputed that Lagatree suffered an adverse employment decision when Luce Forward refrained from hiring him because he refused to sign Luce Forward's compulsory arbitration agreement. Luce Forward contests only whether Lagatree engaged in a protected activity when he refused to sign the arbitration agreement. *See Jurado v. Eleven-Fifty Corp.,* 813 F.2d 1406, 1411 (9th Cir.1987) (finding adverse employment action and causal link were undisputed and only question was whether employee engaged in protected opposition conduct); *EEOC v. Crown Zellerbach Corp.,* 720 F.2d 1008, 1011-12 (9th Cir.1983) (same).

A. Opposing an Unlawful Employment Practice

[6] **[7]** Lagatree's refusal to sign Luce Forward's compulsory arbitration agreement was not protected opposition conduct. Title VII's statutory "opposition clause" prohibits an employer from retaliating against an applicant or employee "because he has opposed any practice made an unlawful employment practice." *See* 42 U.S.C. § 2000e-3(a) (Title VII); *see also* 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 12203(a)(ADA). It is not necessary that the policy opposed be demonstrably unlawful. *Crown Zellerbach,* 720 F.2d at 1013. If the employee's refusal to accede to an employer's policy is based on a *reasonable* belief that the policy is unlawful, the employee's conduct is a protected manner of opposition. *See, e.g., Passantino v. Johnson & Johnson Consumer Prods.,* 212 F.3d 493, 506 (9th Cir.2000) ("Title VII allows employees to freely report actions that they reasonably believe are discriminatory, even if those actions are in fact lawful.").

In September 1997, however, when Lagatree refused to sign Luce Forward's compulsory arbitration agreement as a condition of his employment, he could not have reasonably believed that Luce Forward's arbitration policy was an unlawful employment practice. Indeed, on May 13, 1991, six years before Lagatree's stint at Luce Forward, the Supreme Court in *Gilmer* expressly permitted requiring compulsory arbitration of ADEA claims as a condition of employment. In addition, Congress amended Title VII with § 118 to provide explicitly that "arbitration is encouraged to resolve disputes arising under [Title VII]." Subsequently, in 1994, *Lai* extended the rationale of *Gilmer* to employment discrimination claims brought under Title VII. 42 F.3d at 1303. Finally, by 1997, at least five of our Sister Circuits had interpreted § 118 to permit compulsory arbitration of Title VII claims. Until *Duffield* was decided May, 13, 1998-nearly a year *after* Lagatree's refusal of Luce Forward's employment offer-no Court of Appeals had concluded that § 118 forbade compulsory arbitration of Title VII claims. *Cf. Weeks,* 291 F.3d at 1312 (holding refusal ***1006** to sign a compulsory arbitration agreement in 1999 was not protected opposition conduct because reliance on *Duffield* was not objectively reasonable). In the face of voluminous contrary legal precedent, Lagatree could not have reasonably believed Luce Forward was engaged in unlawful activity when it required arbitration as a condition of employment.

In addition, Lagatree could not have reasonably interpreted the text of any relevant federal statute to forbid compulsory arbitration. The EEOC argues that Lagatree's refusal to waive his procedural right to file or litigate a civil suit was protected opposition conduct because the ADA makes it "unlawful to coerce ... or interfere with any individual in the exercise or enjoyment of ... *any right* granted or protected by this chapter." 42 U.S.C. § 12203(b) (emphasis added). The EEOC's argument, however, assumes contrary to Supreme Court precedent that the right to a judicial forum is a substantive right guaranteed by the ADA.

By 1997, the Supreme Court had held repeatedly that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial forum." *Gilmer,* 500 U.S. at 26, 111 S.Ct. 1647 (quoting *Mitsubishi,* 473 U.S. at 628, 105 S.Ct. 3346). By this language, the Supreme Court distinguished between the substantive rights guaranteed by the statute and the

right to a judicial forum.

Moreover, glaringly absent from the EEOC's argument is any express statutory indication that arbitration of ADA claims (or any other employment discrimination claims) is disfavored. Section 12203 does not mention arbitration at all, and another section of the ADA, 42 U.S.C. § 12212, like § 118 of Title VII, provides that "arbitration is *encouraged* to resolve disputes."

Lagatree could not have reasonably interpreted the ADA's pronouncement that "arbitration is encouraged" to mean that "compulsory arbitration as a condition of employment is forbidden." The EEOC fails to identify a single case from any Circuit that would have supported Lagatree's refusal to sign Luce Forward's compulsory arbitration agreement. Because Lagatree could not have reasonably believed that Luce Forward's policy of requiring arbitration was an unlawful employment practice, his opposition to that policy was not protected opposition conduct. Thus, as a matter of law Luce Forward's refusal to hire Lagatree for not signing a compulsory arbitration agreement was not illegal retaliation.

B. Participating in a Statutorily Authorized Proceeding

[8] By refusing to sign Luce Forward's compulsory arbitration agreement, Lagatree was not participating in a statutorily authorized proceeding. Title VII, the ADA, and the ADEA make it unlawful for an employer to discriminate or retaliate against an employee or an applicant for employment because that person "has made a charge, testified, assisted, or participated in any manner in a ... proceeding." 42 U.S.C. § 2000e-3(a) (Title VII); 42 U.S.C. § 12203(a)(ADA); 29 U.S.C. § 623(d) (ADEA). The EPA similarly makes it unlawful for an employer to discriminate or retaliate against any employee because such employee has "instituted or caused to be instituted a proceeding under or related the [the EPA], or has testified or is about to testify in any such proceeding." 29 U.S.C. § 215(a)(3). A covered "proceeding" undoubtedly includes instituting "a civil action ... in a court of competent jurisdiction." 42 U.S.C. §§ 2000e-5(f)(1), (3) (Title VII); 42 U.S.C. § 12117(a)(ADA); 29 U.S.C. § 626(c)(1) (ADEA); 29 U.S.C. § 216(b)(EPA). An ***1007** individual who files a civil action has "participated in any manner" in a covered proceeding; thus an employer may not retaliate against that individual.

[9] The statutory protections against retaliation also extend to an applicant or an employee who informs his employer of his intention to participate in a statutory proceeding, even if he has not yet done so. *See Gifford v. Atchison, Topeka, & Santa Fe Ry. Co.*, 685 F.2d 1149, 1155-56 (9th Cir.1982) (holding employee states a retaliation claim after being fired for writing a letter threatening an EEOC charge). In *Gifford,* we saw no "legal distinction ... between the filing of a charge which is clearly protected ... and threatening to file a charge." *Id.* at 1156 n. 3.

Here, the EEOC argues that Luce Forward cannot refuse to hire Lagatree because, although he did not file or threaten a civil action, he reserved his right to bring a civil action in a judicial forum. EEOC completes its argument as follows:

> [Luce Forward]'s practice of refusing to employ any individual who will not sign the compulsory waiver ... is effectively a preemptive strike against future participation conduct afforded absolute protection under each of the federal anti-retaliation provisions. Rather than wait for an employee to file or litigate a suit under a federal rights law, or to announce his intention to do so-at which point the employee unquestionably would be statutorily protected from any retaliatory adverse treatment, Luce Forward preemptively denies employment to any individual who will not waive his right to engage in such protected participation activity.

Critical to the EEOC's position is the notion that Lagatree's right to a judicial forum is "afforded absolute protection under each of the federal anti-retaliation provisions." That notion, and thus the EEOC's entire position, lacks merit.

Although Lagatree undoubtedly retained the right to be free from discrimination, a right he could not prospectively waive, *see, e.g.,* 29 U.S.C. § 626(f)(c), no federal law guaranteed him the ability to vindicate that right in a judicial forum. In fact, the Supreme Court in *Gilmer* condoned compulsory arbitration of ADEA claims as a condition of employment. Reaffirming *Gilmer,* in *Circuit City,* the Supreme Court extolled the advantages of arbitrating employment discrimination claims and rejected the "supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." 532 U.S. at 123, 121 S.Ct. 1302. Most importantly, the Supreme Court clarified that the right to a judicial forum was not a substantive right: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Id.*

Waiving the right to a judicial forum is unlike signing a

"yellow dog contract," by which an employer forbids an employee from joining a union. An employee's right to join a union is a substantive right guaranteed by the National Labor Relations Act, 29 U.S.C. § 151. No statute, however, forbids the compulsory waiver of a judicial forum, and thus demanding its waiver is not illegal. While Congress might have forbidden arbitration of employment discrimination claims, instead, it "encouraged" their arbitration.

Along with his experience and credentials, the privilege of a judicial forum was a valuable asset Lagatree brought to the negotiating table. During negotiations, Luce Forward offered Lagatree a base salary of $3,600/month plus substantial benefits in return for his services and his agreement to arbitrate employment-related disputes. Lagatree objected to Luce ***1008** Forward's demand of arbitration and counteroffered, asking that Luce Forward waive its compulsory arbitration requirement. Luce Forward refused to waive compulsory arbitration, and Lagatree initially decided to accept Luce Forward's terms of employment. When Lagatree ultimately refused to agree to Luce Forward's terms of employment, he simply made a rational economic decision that Luce Forward was asking too much and offering too little in return. But Luce Forward incurred no liability as a result of these failed negotiations; it only lost the potential services of a qualified applicant. Indeed, dickering over freely waivable rights is not a protected activity, and the failure to agree to the terms of an employment contract is not retaliation.

CONCLUSION

Circuit City implicitly overruled *Duffield,* and therefore, we vacate the district court's permanent injunction, which relied on *Duffield.* We hold that Luce Forward could require Lagatree to arbitrate potential Title VII claims as a condition of his employment. When Lagatree refused to sign the arbitration agreement, Luce Forward's refusal to hire him was not unlawful retaliation because Lagatree's right to a judicial forum is not afforded absolute protection under any federal statute.

VACATED; REMANDED TO THE DISTRICT COURT FOR JUDGMENT TO BE ENTERED IN FAVOR OF LUCE FORWARD.

PREGERSON, Circuit Judge, Dissenting.

I respectfully dissent. The majority concludes that in *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001), the Supreme Court "implicitly overruled" *Duffield v. Robertson Stephens & Co.,* 144 F.3d 1182 (9th Cir.1998). Maj. op. at 996-97. For the following reasons, I would find that *Duffield* remains good law.

I.

The issue in *Duffield* was whether employers may require their employees, as a mandatory condition of employment, to agree to arbitrate future Title VII claims. *See Duffield,* 144 F.3d at 1185. Based on an analysis of Congress' intent when it amended Title VII through the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), we held that employers may *not* require employees, as a mandatory condition of employment, to agree to arbitrate future Title VII claims. *See Duffield,* 144 F.3d at 1189-90.

The issue in *Circuit City* was whether the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.,* excludes from its coverage not only employment arbitration agreements by transportation workers, but also employment arbitration agreements by *non*-transportation workers. *See Circuit City,* 532 U.S. at 109, 121 S.Ct. 1302. Without mentioning *Duffield,* Title VII, or the Civil Rights Act of 1991, the Supreme Court held that the FAA excludes from its coverage employment arbitration agreement by transportation workers, but not employment arbitration agreements by *non*-transportation workers. *See Circuit City,* 532 U.S. at 109, 121 S.Ct. 1302.

Duffield and *Circuit City* are cases of the proverbial apples and oranges: different law, different issues, and different, yet *compatible holdings.* Most importantly, when the Supreme Court concluded in *Circuit City* that the FAA covers employment arbitration agreements by non-transportation workers, it did *not* also implicitly conclude, *contra Duffield,* that employers may require their employees, as a mandatory condition of employment, to agree to arbitrate future Title VII claims. *Whether the FAA covers employment arbitration* ***1009** *agreements by non-transportation workers*-the issue in *Circuit City*-is one question. *Whether an employer may require an employee, as a mandatory condition of employment, to agree to arbitrate future Title VII claims*-the issue in *Duffield*-is an entirely different question. In answering "yes" to the first question, *Circuit City* did not also implicitly answer "yes" to the second question. "Arbitration under the [FAA] is a matter of consent, not coercion...." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.,* 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). It is entirely consistent to hold-as the Supreme Court did in *Circuit City*-that non-transportation workers who consent in advance to arbitration can later be held to that agreement

under the FAA, and to also hold-as we did in *Duffield*-that employers may not compel their employees to enter arbitration agreements under Title VII. Accordingly, *Duffield* remains good law after *Circuit City,* and the District Court's injunction modeled on *Duffield* should be affirmed.

II.

The majority advances two arguments in support of its conclusion that *Circuit City* "implicitly overruled" *Duffield.* Both arguments are unconvincing.

A.

First, the majority relies on *dicta* in *Circuit City* that "arbitration agreements *can* be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law." Maj. op. at 1002 (quoting *Circuit City,* 532 U.S. at 123, 121 S.Ct. 1302) (emphasis added).1 The majority claims that this "unambiguous proclamation ... cannot be reconciled with *Duffield's* holding that Congress intended Title VII to preclude *compulsory* arbitration of discrimination claims." Maj. op. at 1003 (citing *Circuit City,* 532 U.S. at 123, 121 S.Ct. 1302) (footnote omitted, emphasis added). In reality, there is no contradiction whatsoever between the *Circuit City dicta* and the *Duffield* holding.

In perceiving a contradiction between the *Circuit City dicta* and the *Duffield* holding, the majority ignores a crucial word in the *Duffield* holding: "compulsory." In *Duffield,* we referred to arbitration agreements as compulsory "when individuals must sign an agreement waiving their rights to litigate future claims in a judicial forum in order to obtain employment with, or continue to work for, the employer." *See* 144 F.3d at 1187.2 The Supreme Court said in *Circuit City* only that, *generally,* employees who have ***1010** agreed to arbitrate future claims under federal anti-discrimination law can be held to such arbitration agreements without violating the policies of federal anti-discrimination law. The Supreme Court did *not* also say in *Circuit City-contra Duffield*-that employees can be *required, as a mandatory condition of employment,* to agree to arbitrate future claims under federal anti-discrimination law without violating the policies of federal anti-discrimination law. Nor is the second statement implied in the first. Perhaps more importantly, the *Circuit City dicta* that enforcement of arbitration agreements can be compatible with the *policies* of federal anti-discrimination law does not contradict the *Duffield* holding that in the case of Title VII, enforcement of compulsory arbitration agreements is always incompatible with the *text* and *legislative history* of the § 118 of Civil Rights Act of 1991.

We reached our holding in *Duffield* after closely following instructions set forth by the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) in the context of another federal anti-discrimination law, the Age Discrimination in Employment Act ("ADEA"). In *Gilmer,* the Supreme Court first reiterated that " '[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.' " 500 U.S. at 26, 111 S.Ct. 1647 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)) (alteration in original). The Supreme Court then placed the burden on the plaintiff, who sought to avoid arbitration of his ADEA claim as per agreement, "to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims." *Id.* The Supreme Court observed that "[i]f such an intention exists, it will be discoverable in the text of the ADEA, its legislative history, or an 'inherent conflict' between arbitration and the ADEA's underlying purposes." *Id.* The Supreme Court examined the ADEA in this regard and held that the plaintiff "ha[d] not met his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act." *Id.* at 35, 111 S.Ct. 1647.3

In *Duffield,* we recited these instructions word for word:

> "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi,* ... 473 U.S. [at] 628, 105 S.Ct. 3346.... The burden, therefore, is on Duffield to demonstrate that "Congress intended to preclude a waiver of a judicial ***1011** forum for [Title VII] claims" in the manner mandated by the [securities registration application]. *Gilmer,* 500 U.S. at 26, 111 S.Ct. 1647.... "If such an intention exists, it will be discoverable in the text of [the act at issue], its legislative history, *or* an 'inherent conflict' between arbitration and the [act's] underlying purposes." *Id.* at 26, 111 S.Ct. 1647....

Duffield, 144 F.3d at 1190. We moreover closely followed these instructions in *Duffield* when we found that "Congress' intent to preclude the compulsory arbitration of Title VII claims is conclusively demonstrated in the *text* and/or *legislative history* of the Civil Rights Act of 1991...." *Duffield,* 144 F.3d at 1189-90 (emphasis added);

compare with Gilmer, 500 U.S. at 26, 111 S.Ct. 1647.

Section 118 of the Civil Rights Act of 1991 provides: "*Where appropriate and to the extent authorized by law,* the use of alternative means of dispute resolution, including ... arbitration, is *encouraged* to resolve disputes arising under [Title VII]." Pub. L. No. 102-166, § 118, 105 Stat 1071 (1991), *reprinted in* notes to 42 U.S.C. § 1981 (emphasis added). Regarding the text of § 118, we observed that especially in light of the limiting phrases "[w]here appropriate" and "to the extent authorized by law," "it would seem entirely disingenuous to fasten onto ... one word," i.e., encouraged, "and conclude that Congress was boundlessly in favor of *all* forms of arbitration." *Duffield,* 144 F.3d at 1193. Indeed, given that encouragement implies voluntariness and requirement implies involuntariness, Congress' instruction in § 118 that "arbitration ... is encouraged" if anything seems to contradict the majority's conclusion that arbitration may be required as a condition of employment under Title VII. We concluded that "the *text* of [§ 118] is, at a minimum, ambiguous," and we therefore turned to the *legislative history* of that section. *Duffield,* 144 F.3d at 1193. Because our detailed discussion in *Duffield* of § 118's legislative history unequivocally supports our holding in that case, and because the majority in the present case does not address any part of that discussion, I reproduce that discussion below at some length:

> Congress in fact *specifically rejected* a proposal that would have allowed employers to enforce "compulsory arbitration" agreements. It did so in the most emphatic terms, explaining that:
>
> > H.R. 1 includes a provision encouraging the use of alternative means of dispute resolution to supplement, rather than supplant, the rights and remedies provided by Title VII. The Republican substitute, however, encourages the use of such mechanisms "in place of judicial resolution." Thus, *under the latter proposal employers could refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII complaints* .... American workers should not be forced to choose between their jobs and their civil rights.
>
> H.R. Rep. No. 40(I) at 104 (emphasis added). This rejection of the "Republican" proposal provides ... "strong evidence" of Congress' intent ... to preclude compulsory arbitration of civil rights claims and to "encourage" only voluntary agreements-agreements that do not require potential employees to waive their right to litigate in a judicial forum as a mandatory condition of employment.... The [House] Committee [on Education and Labor]'s view of § 118 was reiterated by key congressmen in the floor debates, who repeatedly stated that § 118 encouraged arbitration only "where parties knowingly and voluntarily elect to use those methods." 137 Cong. Rec. S15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole); see ***1012** also 137 Cong. Rec. H9548 (daily ed. Nov. 7, 1991) (statement of Rep. Hyde) (explaining that § 118 encourages arbitration where "the parties knowingly and voluntarily elect" to submit to such procedures). The most informed and important statements were made by Representative Edwards, the Chairman of the House Committee on Education and Labor. Representative Edwards unequivocally explained during the debate immediately prior to the [Civil Rights] Act [of 1991]'s passage ...: ["]*This section contemplates the use of voluntary arbitration ..., not coercive attempts to force employees in advance to forego statutory rights....* ["] [137 Cong. Rec. H9530 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards)] (emphasis added). Finally, President Bush echoed Congress' understanding of the arbitration section in signing the Act, stating that "section 118 encourages *voluntary* agreements between employers and employees to rely on alternative mechanisms such as mediation and arbitration." Statement of the President of the United States, Signing Ceremony, Pub. L. No. 102-166 (Nov. 21, 1991), reprinted in 1991 U.S.C.C.A.N. 768, 769 (emphasis added).

Duffield, 144 F.3d at 1196-97 (footnote omitted). Notwithstanding the majority's unsupported statement that the *Duffield* court "pick[ed] and cho [se] snippets of legislative history consistent with its desired result," maj. op. at 1001, there can be little doubt in the correctness of the conclusion by the *Duffield* court that arbitration agreements *required* by employers from their employees as a condition of employment are not "*voluntary* arbitration agreements between employers and employees" as envisioned by Congress for Title VII. *Duffield's* holding that enforcement of compulsory arbitration agreements violates the text and legislative history of § 118 of the Civil Rights Act of 1991 is compatible with *Circuit City dicta* that enforcement of consensual arbitration agreements does not violate the policies of federal anti-discrimination law.

B.

Second, the majority claims that "the Supreme Court's emphatic reminder [in *Circuit City*] that the right to a judicial forum is not a substantive right contradicts *Duffield's* fundamental supposition that the Act guaranteed a nonwaivable, substantive right to a jury trial." Maj. op. at 1003. The majority attempts to support this claim by

comparing the Supreme Court's statement in *Circuit City* that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute," 532 U.S. at 123, 121 S.Ct. 1302 (quoting *Gilmer,* 500 U.S. at 26, 111 S.Ct. 1647 (1991) (quoting *Mitsubishi,* 473 U.S. at 628, 105 S.Ct. 3346)), with our holding in *Duffield* that "under the Civil Rights Act of 1991, employers may not [through compulsory arbitration agreements] compel individuals to waive their Title VII right to a judicial forum," 144 F.3d at 1185. *See* maj. op. at 1000. Nowhere in *Duffield,* however, did we suggest that this "right to a judicial forum" is a *substantive* right, as the majority claims. Indeed, our statement in *Duffield* that the Civil Rights Act of 1991 "increased substantially the *procedural* rights and remedies available to Title VII plaintiffs," 144 F.3d at 1189 (emphasis added), suggests, to the contrary, that we perceived the right to a jury trial as a *procedural* right. *Duffield,* then, "was not premised ... on the arbitral forum causing a loss of substantive rights." *Melton v. Philip Morris, Inc.,* No. Civ. 01-93-KI, 2001 WL 1105046, *3 (D.Or. Aug. 9, 2001). Instead, "*Duffield* found 'the context, language and [legislative] history ... make out a conclusive case ... that Congress intended to preclude compulsory arbitration of Title VII claims.' " *Id.* (quoting ***1013** *Duffield,* 144 F.3d at 1199). Accordingly, the Supreme Court's statement that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute," *Circuit City,* 532 U.S. at 123, 121 S.Ct. 1302 (quoting *Gilmer,* 500 U.S. at 26, 111 S.Ct. 1647 (1991) (quoting *Mitsubishi,* 473 U.S. at 628, 105 S.Ct. 3346)), does not contradict our conclusion that "Congress intended to preclude compulsory arbitration of Title VII claims," *Duffield,* 144 F.3d at 1199.

Most damaging to the majority's argument is that already in *Duffield,* we considered the very language which the Supreme Court later quoted in *Circuit City*-and which the majority now concludes "contradicts" our holding in *Duffield*-and concluded that this language was compatible with our holding there. We first wrote: "We recognize that, as the Supreme Court has stated, agreements to arbitrate must generally be treated not as 'forego[ing] the substantive rights afforded by [a] statute,' but rather as merely changing the forum in which they are protected. *Gilmer,* 500 U.S. at 26, 111 S.Ct. 1647 ... (quoting *Mitsubishi,* 473 U.S. at 628, 105 S.Ct. 3346....)" *Duffield,* 144 F.3d at 1199. We then explained:

> Yet even assuming that the general federal policy in favor of arbitration would ordinarily apply to the compulsory arbitration of civil rights claims, we are not free to apply that policy here. Where Congress has manifested its intent, with regard to arbitration questions and otherwise, the Supreme Court has made it abundantly clear that the judiciary is not free to "legislate" its own contrary preferences.

Id. (citing *Brogan v. United States,* 522 U.S. 398, 406-07, 118 S.Ct. 805, 139 L.Ed.2d 830 (1998)).
According to the majority, *Circuit City* contradicted *Duffield* by merely re-quoting language from *Gilmer* and *Mitsubishi;* language which we already considered in *Duffield* and found compatible with our holding there. The majority reads too much into *Circuit City. Circuit City* added nothing to the interpretation of the *Gilmer/Mitsubishi* language. In particular, *Circuit City* did not contradict the interpretation of that language in *Duffield.* In the end, the majority does no more than register *its own* disagreement with this court's earlier interpretation of the *Gilmer/ Mitsubishi* language in *Duffield.* But as the majority acknowledges, such disagreement by one panel of this court with a prior panel of this court is not a proper ground for reconsidering the decision of the prior panel. *See* maj. op. at 1002 (citing *United States v. Gay,* 967 F.2d 322, 327 (9th Cir.1992)).4

***1014 III.**

Less than four years ago, the Supreme Court denied certiorari in *Duffield. See Duffield v. Robertson, Stephens & Co.,* 525 U.S. 982, 119 S.Ct. 445, 142 L.Ed.2d 399 (1998). Last year, the same Supreme Court decided a different issue in *Circuit City* without as much as mentioning *Duffield.* In the present case, the majority, after brushing aside *Duffield's* careful statutory interpretation as an "exercise," maj. op. at 1000, and reading into *Circuit City* what isn't there, somehow reaches "the inevitable conclusion" that *Duffield* has been "implicitly overruled" and "no longer remains good law," maj. op. at 1003, 1008. The majority recognizes that it is error for one panel of our court to "remed[y]" the decision of another panel of our court, unless "a decision of the Supreme Court requires th[e] panel" to do so. Maj. op. at 1002.5 Indeed, we observed in *Gay* that "one three-judge panel of this court cannot reconsider or overrule the decision of a prior panel," except "when 'an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point.' " 967 F.2d at 327 (quoting *United States v. Lancellotti,* 761 F.2d 1363, 1366 (9th Cir.1985)). Because no intervening decision by the Supreme Court has undermined *Duffield's* holding, it is error for the majority to reconsider that holding.

Perhaps most disturbing is that the majority does not consider the consequences of its holding today. By

allowing employers to require their employees, as a mandatory condition of employment, to agree to arbitrate future Title VII claims, the majority allows employers to force their employees to chose between their jobs and their right to bring future Title VII claims in court. That choice, of course, is no choice at all.6 There may be "real benefits to the enforcement of arbitration provisions." Maj. op. at 1002 (quoting *Circuit City,* 532 U.S. at 122-23, 121 S.Ct. 1302).7 ***1015** That does not justify allowing employers to shove arbitration provisions down the throats of individual employees as a non-negotiable precondition of employment.

I dissent.

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Footnotes

* The Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

1 In the wake of *Gilmer,* the Supreme Court vacated and remanded the Fifth Circuit's decision in *Alford v. Dean Witter Reynolds, Inc.,* which had held that an employee was *not* required to arbitrate her Title VII sex discrimination and sexual harassment claims despite having signed a compulsory arbitration agreement. 905 F.2d 104 (5th Cir.1990), *vacated by* 500 U.S. 930, 111 S.Ct. 2050, 114 L.Ed.2d 456 (1991) ("The judgment is vacated and the case is remanded to the ... Fifth Circuit for further consideration in light of *Gilmer* ...."). The Fifth Circuit reversed itself, holding that Title VII claims may be arbitrated pursuant to a compulsory agreement. *Alford v. Dean Witter Reynolds, Inc.,* 939 F.2d 229, 230 (5th Cir.1991).

2 The dissent claims we ignore the import of the word "compulsory" which it equates with "coercive" employer conduct. We do no such thing. However, instead of categorically prohibiting all so-called "compulsory" arbitration agreements, as the dissent would do, we police truly "coercive" employer conduct through the application of traditional contract law principles, including unconscionability, which specifically examines the question of coercion. *See e.g., Armendariz v. Found. Health Psychcare Serv. Inc.,* 24 Cal.4th 83, 113-22, 99 Cal.Rptr.2d 745, 6 P.3d 669 (2000).

3 The dissent cites *Melton v. Philip Morris, Inc.,* No. Civ. 01-93-KI, 2001 WL 1105046, at *3 (D.Or. Aug. 9, 2001), for the proposition that *Duffield* "was not premised ... on the arbitral forum causing a loss of substantive rights," but amazingly neglects to consider or explain *Duffield's* own language to the contrary. *See, e.g., Duffield,* 144 F.3d at 1185.

4 It seems our remedial efforts arrived not a moment too soon. Our own Court has begun to hack away at *Duffield's* viability. *See Circuit City Stores v. Najd,* 294 F.3d 1104, 1106-07 (9th Cir.2002) ("*Duffield's* continued validity is questionable."). Our Sister Circuits have also begun to undermine *Duffield. Weeks,* 291 F.3d at 1315 ("Further, the viability of *Duffield* has been recognized to be in considerable doubt in light of the later decided *Circuit City.*"); *Borg-Warner,* 245 F.3d at 835 ("We cannot say whether the Ninth Circuit will continue to adhere to *Duffield* in the face of the Supreme Court's *Circuit City* decision."). More noteworthy, perhaps, our district courts are adrift, wondering whether *Duffield* remains valid precedent. Four district court opinions have held that *Circuit City* implicitly overruled *Duffield. Farac v. Permanente Med. Group,* 186 F.Supp.2d 1042, 1045 (N.D.Cal.2002) ("*Circuit City* implicitly overruled *Duffield.*"); *Eftekhari v. Peregrine Fin. & Sec., Inc.,* No. C 00-3594 JL, 2001 U.S. Dist. LEXIS 16087, at *25, 2001 WL 1180640 (N.D.Cal. September 24, 2001); *Olivares v. Hispanic Broad. Corp.,* No. CV 00-00354-ER, 2001 U.S. Dist. LEXIS 5760, at *1-2, 2001 WL 477171 (C.D. Cal. April 26, 2001); *Scott v. Burns Int'l Sec. Servs., Inc.,* 165 F.Supp.2d 1133, 1137 (D.Hawai'i 2001) ("The Supreme Court's contrary statement in *Circuit City* that arbitration agreements do not contravene the policies of congressional enactments of the protections of federal law ... implicitly overrules ... *Duffield.*"). However, three district court opinions have expressed the contrary view that *Duffield* remains valid precedent. *Circuit City Stores v. Banyasz,* No. C-01-3106 WHO, 2001 U.S. Dist. LEXIS 16953, at *6-8, 2001 WL 1218406 (N.D.Cal. Oct. 11, 2001); *Melton,* 2001 U.S. Dist. LEXIS, at *6-9, 2001 WL 1105046 (D.Or. Aug. 9, 2001); *Ferguson v. Countrywide Credit Indus., Inc.,* No. CV00-13096AHM(CTX), 2001 U.S. Dist. LEXIS, 2001 WL 867103 (C.D.Cal. Apr. 23, 2001) *aff'd on other grounds* 298 F.3d 778 (9th Cir.2002) (Pregerson J.).

5 To quote the recently-departed polymath, Stephen J. Gould, "[a]s the great Italian economist Vilfredo Pareto wrote: 'Give me a fruitful error any time, full of seeds, bursting with its own corrections. You can keep your sterile truth for yourself.' " Stephen J. Gould, *The Panda's Thumb,* 244 (1980).

6 "We do not resort to legislative history to cloud a statutory text that is clear." *Circuit City,* 532 U.S. at 119, 121 S.Ct. 1302 (quoting *Ratzlaf v. United States,* 510 U.S. 135, 147-48, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994)).

7 All the federal anti-discrimination statutes contain similar provisions forbidding retaliation. By way of representative example, Title VII, 42 U.S.C. § 2000e-3, provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this subchapter or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

1 The above quoted passage from *Circuit City* is *dicta* because it refers only to *federal* anti-discrimination law and *Circuit City* involves exclusively *state* anti-discrimination law. *See* 532 U.S. at 110, 123, 121 S.Ct. 1302. Needless to say, such *dicta* cannot overrule-not even explicitly and much less "implicitly"-a holding, like the one in *Duffield.* This fact by itself invalidates the majority's first argument in support of its conclusion that *Circuit City* "implicitly overruled" *Duffield.* But even if this were not enough, there are-as shown below-additional reasons to reject the majority's first argument.

2 In *Duffield,* we thus did not use the term "compulsory arbitration" as it is traditionally defined. *See Black's Law Dictionary* 100 (7th ed. 1999) (defining "compulsory arbitration" as "[a]rbitration required by law or forced by law on the parties"). "Compulsory arbitration," both as we used that term in *Duffield* and as it is traditionally defined, must furthermore be distinguished from "mandatory arbitration." *See, e.g., Koveleskie v. SBC Capital Mkts., Inc.,* 167 F.3d 361, 362 (7th Cir.1999) (employing the term "mandatory arbitration" to reflect "the contractual situation where if one party to a dispute requests arbitration, the other party is obliged to arbitrate").

3 It is misleading to state, as the majority does, that the Supreme Court held in *Gilmer* that "an employer could compel arbitration of an employee's ADEA claim pursuant to an arbitration provision required as a condition of his employment." Maj. op. at 999. The Supreme Court indeed stated the question presented as "whether a claim under the [ADEA] can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application." *Gilmer,* 500 U.S. at 23, 111 S.Ct. 1647. But the Supreme Court did *not* use the term "compulsory" in the sense given to that term in *Duffield,* i.e., requiring an employee to sign an arbitration agreement as a condition of employment. *See supra* note 2 and accompanying text. Rather, the Supreme Court used the term "compulsory" in the sense of "mandatory," i.e., contractually required. *See id.* And while the arbitration provision at issue in *Gilmer* was indeed required as a condition of employment, this was *not* made an issue by the Supreme Court, which held more generally that the plaintiff "ha[d] not met his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act." *Gilmer,* 500 U.S. at 35, 111 S.Ct. 1647. Thus, there is no conflict between *Gilmer* and *Duffield.*

4 For the same reasons, the Supreme Court's subsequent statement in *EEOC v. Waffle House, Inc.,* 534 U.S. 279, 122 S.Ct. 754, 765 n. 10, 151 L.Ed.2d 755 (2002), that "[the Supreme Court has] held that federal statutory claims may be the subject of arbitration agreements that are enforceable pursuant to the FAA because the agreement only determines the choice of forum" does not make "*Duffield's* continuing validity ... questionable" or "cast doubt as to whether Congress precluded compulsory arbitration of Title VII claims," contrary to what a panel of this court recently suggested in *Circuit City Stores, Inc. v. Najd,* 294 F.3d 1104 (9th Cir.2002). *See id.* at 1107 (stating that "[u]ltimately," the *Najd* court did not have to "decide whether *Duffield* remains good law because Najd did not sue under Title VII"), *see also id.* at 1110 (Paez, J., concurring) (criticizing the *Najd* majority's "assault on the validity of *Duffield*" as "entirely unnecessary" and "merely gratuitous"). In support of its statement that federal statutory claims may be the subject of enforceable arbitration agreements because such agreements determine only the choice of forum, the *Waffle House* Court-like the *Circuit City* Court-merely re-quoted the same passage from *Gilmer* and *Mitsubishi* which we already considered in *Duffield* and found compatible with our holding there. *See Waffle House,* 122 S.Ct. at 765 n. 10, 122 S.Ct. 754 (quoting *Gilmer,* 500 U.S. at 26, 111 S.Ct. 1647 (quoting *Mitsubishi,* 473 U.S. at 628, 105 S.Ct. 3346)).

5 It is, therefore, irrelevant whether "[s]ince our *Duffield* decision in 1998, our Sister Circuits as well as the Supreme Courts of California and Nevada have unanimously repudiated its holding." Maj. op. at 1001-02. Moreover, six of the ten cases from other circuits cited in support of this statement were decided *before Duffield.* In none of these six cases was the question at issue in *Duffield* and in the present case-whether employers may require employees, as a condition of employment, to agree to arbitrate future Title VII claims-a question that was explicitly decided *contra Duffield.*

6 More than three-quarters of a century ago, Andrew Furuseth, then president of the International Seaman's Union of America, said in opposition to the FAA as originally proposed: "Will such contracts be signed? Esau agreed, because he was hungry.... With the growing hunger in modern society, there will be but few that will be able to resist." *Proceedings of the 26th Annual Convention of the International Seaman's Union of America* 203-204 (1923). This still holds true today, if employers are allowed to require their employees, as a condition of employment, to agree to arbitrate their future Title VII claims. It was for this reason that in 1991, Congress rejected a "Republican substitute" for § 118 which would have allowed such compulsory arbitration agreements. Congress explained that "American workers should not be forced to choose between their jobs and their civil rights." H.R. Rep. No. 40(I) at 104 (emphasis added).

7 There are also well-known "potential disadvantages" from the employees' point of view, such as "waiver of a right to a jury trial, limited discovery, and limited judicial review." *Armendariz v. Found. Health Psychcare Servs., Inc.,* 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669, 690 (2000) (noting also that "[v]arious studies show that arbitration is advantageous to the employers ... because it reduces the size of the award that an employee is likely to get, particularly if the employer is a 'repeat player' in the arbitration

system"). *See also Paladino v. Avnet Computer Techs., Inc.,* 134 F.3d 1054, 1062 (11th Cir.1998) (noting that "[a]rbitration ordinarily brings hardship for litigants along with potential efficiency" because "[a]rbitral litigants often lack discovery, evidentiary rules, a jury, and any meaningful right to further review"); Katherine Eddy, Note, *To Every Remedy a Wrong: The Confounding of Civil Liberties Through Mandatory Arbitration Clauses in Employment Contracts,* 52 Hastings L.J. 771, 776-77 (2001) (noting that "[a]nother major disadvantage [of arbitration] to employee-plaintiffs is the lack of diversity among the arbitrators from which the employee may choose" because, for example, "[o]f the 50,000 arbitrators on the American Arbitration Association panels, only 6% are women").

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389 F.3d 802
United States Court of Appeals, Ninth Circuit.

David ENLOW, Plaintiff-Appellant,
v.
SALEM-KEIZER YELLOW CAB CO., INC., an Oregon corporation, Defendant-Appellee.

No. 02-35881. | Argued and Submitted Nov. 4, 2003. | Filed June 10, 2004. | Amended Nov. 2, 2004.

Synopsis

Background: Former employee brought action against former employer alleging discrimination under the Age Discrimination in Employment Act (ADEA). The United States District Court for the District of Oregon, Donald C. Ashmanskas, United States Magistrate Judge, 2001 WL 34041899, denied employee's motion for partial summary judgment and granted employer's motion for summary judgment. Employee appealed.

Holdings: The Court of Appeals, Alarcón, Circuit Judge, held that:
[1] district court erroneously applied *McDonnell Douglas* burden-shifting analysis, and
[2] genuine issue of material fact existed as to whether termination of employee was temporary or permanent.

Affirmed in part and vacated in part.

Ferguson, Circuit Judge, filed opinion concurring in part and dissenting in part.

Opinion, 371 F.3d 645, superseded on denial of rehearing.

West Headnotes (8)

[1] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

District court erroneously applied *McDonnell Douglas* burden-shifting analysis in ruling on employer's summary judgment motion in ADEA action by requiring former employee to produce evidence that employer had a discriminatory motive for terminating his employment as a taxi driver, where employee presented direct evidence that employer permanently terminated his employment because he was over 70; evidence that employee was 73 years old and that employer's new auto insurance policy did not cover drivers over the age of 70 supported inference that employer had adopted practice of intentionally discriminating against drivers over 70 years of age. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

14 Cases that cite this headnote

[2] **Civil Rights**
Disparate Treatment
Civil Rights
Disparate Treatment

Disparate treatment is demonstrated when the employer simply treats some people less favorably than others because of their race, color, religion or other protected characteristics.

1 Cases that cite this headnote

[3] **Civil Rights**
Disparate Treatment

Liability in a disparate treatment claim under the ADEA depends on whether the protected trait of age actually motivated the employer's decision. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

4 Cases that cite this headnote

[4] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

When an employee alleges disparate treatment based on direct evidence in an ADEA claim, the

Court of Appeals does not apply the burden-shifting analysis set forth in *McDonnell Douglas* in determining whether the evidence is sufficient to defeat a motion for summary judgment. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

24 Cases that cite this headnote

[5] **Civil Rights**
Age Discrimination

Direct evidence of discrimination in the context of an ADEA claim is defined as evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude sufficient to permit the fact finder to infer that attitude was more likely than not a motivating factor in the employer's decision. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

38 Cases that cite this headnote

[6] **Civil Rights**
Age Discrimination

The *McDonnell Douglas* burden shifting formula applies under the ADEA where an employee must rely on circumstantial evidence that he or she was at least 40 years old, met the requisite qualifications for the job, and was discharged while younger employees were retained; it creates a presumption that the employer unlawfully discriminated against the employee. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

11 Cases that cite this headnote

[7] **Civil Rights**
Effect of Prima Facie Case; Shifting Burden

Under *McDonnell Douglas*, if an employee presents prima facie circumstantial evidence of discrimination, the burden shifts to the employer to produce evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason; this burden-shifting scheme is designed to assure that the plaintiff has his day in court despite the unavailability of direct evidence.

8 Cases that cite this headnote

[8] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Genuine issue of material fact existed as to whether employer permanently terminated 73 year old employee from his taxi driver position, or whether employee was temporarily discharged to avoid termination of employer's business license while it negotiated with it insurer to waive age exclusion provisions in its auto policy, precluding summary judgment in employee's ADEA action against employer. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

Attorneys and Law Firms

***804** John S. Razor, The Law Office of John S. Razor, Salem, OR, for the plaintiff-appellant.

Robert J. Custis, Kent Custis LLP, Portland, OR, for the defendant-appellee.

Appeal from the United States District Court for the District of Oregon; Donald C. Ashmanskas, Magistrate Judge, Presiding.* D.C. No. CV-00-01331-AS.

Before: ALARCÓN, FERGUSON, and RAWLINSON, Circuit Judges.

Opinion

Opinion by Judge ALARCÓN; Partial Concurrence and

Partial Dissent by Judge FERGUSON.

ORDER

The court's opinion, filed June 10, 2004, [371 F.3d 645] is amended as follows:

The second paragraph on slip op. 7621 [371 F.3d at 647] that reads:

> We affirm the denial of his motion because we conclude that Yellow Cab presented sufficient evidence to raise a genuine issue of material fact regarding whether it terminated Mr. Enlow's employment temporarily without discriminatory intent. We reverse the order granting Yellow Cab's motion for summary judgment, however, because the district erred in concluding that Mr. Enlow failed to present prima facie evidence that Yellow Cab acted with a discriminatory motive or intent.

is deleted.

The following paragraph shall be inserted on page 7621 [371 F.3d at 647] and substituted for the deleted text.

> We affirm the denial of his motion because we conclude that Yellow Cab presented sufficient evidence to raise a genuine issue of material fact regarding whether, as asserted in its response to Enlow's motion for partial summary judgment, it terminated Mr. Enlow's employment *temporarily* based on a bona fide occupational qualification ("BFOQ") or because of reasonable factors other than age ("RFOA"). We reverse the order granting Yellow Cab's motion for summary judgment, however, because the district erred in concluding that Mr. Enlow failed to present prima ***805** facie evidence that Yellow Cab acted with a discriminatory motive or intent.

On the sixth line of slip op. 7623 [371 F.3d at 648], delete "seventy-two" and substitute "seventy-three" for the deleted text.

On slip op. 7623 [371 F.3d at 648], the second sentence of the second paragraph reads:

> We discuss below the conflicting evidence presented by the parties regarding whether the termination of Mr. Enlow's employment was intended to be temporary or permanent, and whether Yellow Cab acted pursuant to a facially discriminatory employment practice to discharge employees over seventy years old.

is deleted.

The following sentence shall be inserted on slip op. 7623 [371 F.3d at 648] and substituted for the deleted text:

> We discuss below the conflicting evidence presented by the parties regarding whether Mr. Enlow's employment was permanently terminated solely to save costs, or whether Yellow Cab intended to interrupt his employment temporarily in order to avoid losing its business license.

In the fifth line of the last paragraph on slip op. 7623 [371 F.3d at 648] delete "seventy-two years old" and substitute "seventy-three years old" for the deleted text.

In the first paragraph under Part One on slip op. 7624 [371 F.3d at 649] insert the words "in order to survive a motion for summary judgment" at the end of the second sentence.

In the first line of the paragraph beginning on line 8 on slip op. 7627 [371 F.3d at 650] insert "In his opposition to the motion for summary judgment," before the words "Mr. Enlow".

On line 10 of slip op. 7627 [371 F.3d at 650] delete "seventy-two years old" and substitute "seventy-three years old" for the deleted text.

On line 11 of slip op. 7627 [371 F.3d at 650] insert the following sentences after the word "seventy."

> In an affidavit filed in support of his motion for summary judgment, Mr. Enlow declared that "[a]t no time did the defendant offer me an unconditional offer of re-employment." He further, stated that "[m]y understanding at the time of my termination was that I was terminated and would no longer be working for the Defendant."

On lines 15 and 16 of slip op. 7628 [371 F.3d at 651] delete the words "by an age discriminatory employment practice" and substitute "because he was over the age of seventy" for the deleted text.

Beginning with line 16 of slip op. 7628 [371 F.3d at 651] delete:

> Mr. Enlow relied on the direct evidence that his employment was terminated because the Star Insurance policy did not cover employees who were older than seventy years of age. This evidence was sufficient to support an inference that by terminating his employment after purchasing the Star Insurance policy, Yellow Cab adopted a practice of intentionally discriminating against employees over seventy years of age.

Beginning with line 28 on slip op. 7628 [371 F.3d at 651] delete:

> At trial, Mr. Enlow will bear the burden of persuading the trier of fact by a preponderance of the evidence that Yellow Cab's motive in terminating Mr. Enlow's employment was discriminatory. *See Reeves,* 530 U.S. at 143, 120 S.Ct. 2097 (" 'The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the ***806** plaintiff.' ") (quoting *Burdine,* 450 U.S. at 253, 101 S.Ct. 1089).

Beginning with line 15 on slip op. 7629 [371 F.3d at 651-52] delete the following text to line 16 on slip op. 7630 [371 F.3d at 652].

> Accordingly, Mr. Enlow's reliance on *UAW v. Johnson Controls, Inc.,* 499 U.S. 187, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991) is misplaced. In *Johnson Controls,* the employer was aware of the discriminatory provision when it adopted an employment practice barring all women, except those whose infertility was medically documented, from jobs involving actual or potential lead exposure exceeding governmental standards. *Id.* at 198-99, 111 S.Ct. 1196. Yellow Cab's temporary discharge of Mr. Enlow was in reaction to an unanticipated exigent circumstance that threatened the suspension of its license to conduct business.
>
> Likewise, *City of Los Angeles Dept. of Water & Power v. Manhart,* 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) is readily distinguishable. In *Manhart,* the Department of Water and Power knowingly and intentionally administered a retirement, disability and death-benefit program that required its female employees to make larger contributions to the pension fund that its male employees. *Id.* at 704, 98 S.Ct. 1370. The decision to adopt an employment practice that treated men differently from women was carefully calculated, "[b]ased on a study of mortality tables and [the Department's] own experience." *Id.* at 705, 98 S.Ct. 1370. Mr. Enlow has presented no evidence that establishes that Yellow Cab had any knowledge of the discriminatory provisions in the Star Insurance policy when it purchased the policy. Nor has Mr. Enlow presented any evidence that Yellow Cab deliberately adopted an employment practice or program in order to discriminate against persons over forty in violation of the ADEA. Thus, Mr. Enlow failed to establish, as required by the Supreme Court's more recent *Hazen* decision, that Yellow Cab "*relied* upon a formal, facially discriminatory policy requiring adverse treatment" of older employees when it purchased the Star Insurance policy. *Hazen,* 507 U.S. at 610, 113 S.Ct. 1701 (emphasis added) (explaining that *Manhart* presented a case of disparate treatment because the employer "relied" on a "formal" policy requiring discrimination). Mr. Enlow has not demonstrated that his age "actually motivated [his] employer's decision" to purchase a new insurance policy. *Id.*

On line 21 and 22 of slip op. 7630 [371 F.3d at 652] delete:

> "of a legitimate, nondiscriminatory reason for *temporarily* terminating Mr. Enlow's employment."

On line 21 and 22 of slip op. 7630 [371 F.3d at 652] substitute the following for the deleted text:

> "that Mr. Enlow's employment was not permanently terminated."

On line 22 of slip op. 7630 [371 F.3d at 652] insert after "Mr. Haley" the following text:

> ", Yellow Cab's personnel manager,"

One line 22 of slip op. 7630 [371 F.3d at 652] delete the word "alleged" and substitute the word "declared" for the deleted word.

On line 5 of slip op. 7631 [371 F.3d at 652] delete "Mr. Anderson alleged". Insert "Mr. Gary Anderson, Yellow Cab's Secretary/ Treasurer, declared" and substitute for the deleted text.

On line 20 of slip op. 7631 [371 F.3d at 653] insert after the word "behalf.", "Mr. Anderson declared:".

On line 25 of slip op. 7631 [371 F.3d at 653], delete "of his termination from Yellow ***807** Cab" and substitute "of the termination of his employment with Yellow Cab" for the deleted text.

On line 31 of slip op. 7631 [371 F.3d at 653], delete "alleged" and substitute "declared".

The paragraph on slip op. 7632 [371 F.3d at 653] that reads:

> Viewed in the light most favorable to Yellow Cab, this evidence shows that it did not have an explicit facially discriminatory employment practice to terminate the employment of taxi cab drivers who were more than seventy years old. Instead, the evidence shows that Mr. Enlow was temporarily discharged to avoid termination of Yellow Cab's business license while it negotiated with Star Insurance to waive the age exclusion provisions in its policy. As a demonstration of its intent to protect Mr. Enlow's employment rights, Yellow Cab successfully obtained temporary employment for him with another cab company. Yellow Cab also obtained Star Insurance's tentative agreement to waive the age-based exclusion of coverage if Mr. Enlow would submit to a physical examination. Mr. Enlow rejected Star Insurance's willingness to consider waiving its age exclusion provisions if he could pass a physical examination. He also declined Yellow Cab's offer to reemploy him. The evidence offered by Yellow Cab presents a genuine issue of material fact regarding whether the termination of employment was temporary or permanent and whether Yellow Cab acted with discriminatory animus against employees over forty years of age. Accordingly, the district court did not err in denying Mr. Enlow's motion for partial summary judgment.

is deleted.

The following paragraph shall be inserted on slip op. 7632 [371 F.3d at 653] for the deleted text:

> Viewed in the light most favorable to Yellow Cab, this evidence shows that it did not permanently terminate Mr. Enlow's employment because he was more than seventy years old. Instead, Yellow Cab's evidence shows that Mr. Enlow was temporarily discharged to avoid termination of Yellow Cab's business license while it negotiated with Star Insurance to waive the age exclusion provisions in its policy. As a demonstration of its intent to protect Mr. Enlow's employment rights, Yellow Cab successfully obtained temporary employment for him with another cab company. Yellow Cab also obtained Star Insurance's tentative agreement to waive the age-based exclusion of coverage if Mr. Enlow would submit to a physical examination. Mr. Enlow rejected Star Insurance's willingness to consider waiving its age exclusion provisions if he could pass a physical examination. He also declined Yellow Cab's offer to reemploy him. The evidence offered by Yellow Cab presents a genuine issue of material fact regarding whether it can demonstrate at trial that its employment decision "falls within one of the exceptions to the ADEA's prohibitions." *EEOC v. Santa Barbara,* 666 F.2d 373, 375 (9th Cir.1982) (citations omitted). The ADEA provides that "[i]t shall not be unlawful for an employer ... to take any action otherwise prohibited under ... this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the based on reasonable factors other than age...." 29 U.S.C. § 623(f)(1). "The validity of a BFOQ turns upon factual findings, preferably ones by a jury." *EEOC v. Boeing Company,* 843 F.2d 1213, 1216 (9th Cir.1988).
>
> ***808** Whether a BFOQ or RFOA defense will sustain a judgment in favor of Yellow Cab will depend on the resolution of disputed factual issues which can only be resolved by a trier of fact regarding the employment action Yellow Cab actually took, such as, whether Mr. Enlow's discharge was temporary or permanent, was subject to a medical test, did he refuse an offer of reinstatement, was he laid off solely for the time necessary for Yellow Cab to obtain insurance coverage for him, and whether it was prohibitively expensive to insure drivers over seventy. We cannot decide on the sharply disputed facts in this record which version of the facts will be persuasive to a jury, and which party should prevail on appeal as a matter of law. Thus, we express no view at this interlocutory stage of these proceedings regarding the principles of law that will be applicable after the jury has made its findings and we have a complete record of the relevant facts. The district court did not err in denying Mr. Enlow's motion for partial summary judgment.

Delete the paragraphs beginning after "Conclusion" on slip op. 7632 [371 F.3d at 653] and slip op. 7633 [371 F.3d at 654] that read:

> We conclude that Mr. Enlow presented sufficient direct evidence to support an inference that Yellow Cab's decision to terminate his employment was motivated by discriminatory animus. For that reason, the district court erred in granting Yellow Cab's motion for summary judgment on the ground that Mr. Enlow failed to present evidence that Yellow Cab acted with discriminatory animus.
>
> We also hold that Yellow Cab presented sufficient evidence to demonstrate that its temporary discharge of Mr. Enlow was without discriminatory intent, and was solely to avoid losing its business license based on the fact that all of its employees were not covered by automobile liability insurance. Mr. Enlow failed to present any evidence that Yellow Cab acted pursuant to an explicit facially discriminatory company practice to fire taxi cab drivers who were over seventy years of age. Thus, the district court did not err in denying Mr. Enlow's partial motion for summary judgment. Because there are genuine issues of material fact in dispute, we reject Mr. Enlow's request that we instruct the district court to grant his motion for summary judgment.

The following two paragraphs shall be inserted on slip op. 7632 [371 F.3d at 653] and slip op. 7633 [371 F.3d at 654] and substituted for the deleted material.

> We conclude that Mr. Enlow presented sufficient direct evidence to support an inference that Yellow Cab's decision to terminate his employment was based on the fact that he was more than seventy years of age. For that reason, the district court erred in granting Yellow Cab's motion for summary judgment on the ground that Mr. Enlow failed to present any evidence that Yellow Cab acted with discriminatory animus.
>
> We also hold that Yellow Cab presented sufficient evidence to raise a genuine issue of disputed fact regarding whether Mr. Enlow was permanently discharged because of his age, or whether it has a viable BFOQ or a RFOA affirmative defense based on its evidence that a temporary discharge was necessary to avoid losing its business license because all of its employees were not covered by automobile liability insurance. The district court did not err in denying Mr. Enlow's partial motion for summary judgment. Because there are genuine issues of material fact in dispute, we reject Mr. Enlow's request that we instruct ***809** the district court to grant his motion for summary judgment.

With these amendments, Judge Alarcón and Judge Rawlinson have voted to deny the petition for rehearing. Judge Ferguson has voted to grant the petition for rehearing. Judge Rawlinson has voted to deny the petition for rehearing en banc. Judge Alarcón recommended that the petition for rehearing en banc be denied. Judge Ferguson recommended that the petition for rehearing en banc be granted.

The full court has been advised of the petition for rehearing en banc. No judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

OPINION

ALARCÓN, Circuit Judge.

David Enlow appeals from the order denying his motion for partial summary judgment regarding his Age Discrimination in Employment Act ("ADEA") claim, and the order granting Salem-Keizer Yellow Cab Co.'s ("Yellow Cab") cross-motion for summary judgment. Mr. Enlow contends that he was entitled to summary judgment because he presented direct evidence that Yellow Cab permanently discharged him solely because of his age.

We affirm the denial of his motion because we conclude that Yellow Cab presented sufficient evidence to raise a genuine issue of material fact regarding whether, as asserted in its response to Enlow's motion for partial summary judgment, it terminated Mr. Enlow's employment *temporarily* based on a bona fide occupational qualification ("BFOQ") or because of reasonable factors other than age ("RFOA"). We reverse the order granting Yellow Cab's motion for summary judgment, however, because the district erred in concluding that Mr. Enlow failed to present prima facie evidence that Yellow Cab acted with a discriminatory motive or intent.

We analyze the legal questions raised in this appeal separately. In Part One, we explain why we conclude that the district court erred in granting Yellow Cab's motion for summary judgment. In Part Two, we consider whether Yellow Cab presented sufficient evidence in response to Mr. Enlow's motion for partial summary judgment to raise a genuine issue of material fact requiring that the parties have their day in court to determine which party should prevail.

Facts and Procedural Background

Sometime prior to June 24, 1999, a representative from the

Bell Anderson insurance agency in Tacoma, Washington contacted Yellow Cab to see if it would be interested in a new insurance product that could save Yellow Cab a significant amount of money on its annual insurance premiums. After considering the quoted premium, Yellow Cab decided to accept the new policy. It is undisputed that Yellow Cab purchased the insurance policy from Meadowbrook Insurance Group because the cost of its new product, Star Insurance, was more than $10,000 less than the amount Yellow Cab had paid previously to the Reliance Insurance Co. ("Reliance Insurance"). At the time Yellow Cab accepted the Star Insurance offer, it had no knowledge that the policy excluded coverage of employees younger than twenty-three or older than seventy years of age.

In order to obtain a business license to operate a "[v]ehicle for hire," the City of Salem, Oregon requires that a taxi cab company carry automobile liability insurance that covers each person employed as a "[t]axicab driver." Salem Revised Code, Title 3, Ch. 34.002(I), (j), 34.010(d). Yellow ***810** Cab's liability coverage under the Star Insurance policy was scheduled to take effect on June 25, 1999, the same date that its Reliance Insurance policy was due to expire. Yellow Cab paid $13,200 to Star Insurance, representing a 20% down payment on the new policy, and was scheduled to begin making monthly payments on that policy on July 1, 1999.
The City of Salem required Yellow Cab to inform it of the insurance it planned to use no later than June 25, 1999. Yellow Cab faced suspension of its business license on that date if it could not provide proof of insurance for each taxi cab driver in its employ.[1]

At 4:00 p.m. on June 24, 1999, a Star Insurance agent called Gary Anderson, Yellow Cab's Secretary/Treasurer, to inform him that its new policy did not cover employees younger than twenty-three or older than seventy years of age, and that Mr. Enlow was not eligible for insurance under the new policy because he was seventy-three years old. Prior to June 24, Yellow Cab had not received a copy of the Star Insurance policy, nor had it reviewed the Star Insurance policy's underwriting guidelines or restrictions.

After learning of the age limitation in the Star Insurance policy, Yellow Cab's personnel manager, Richard Haley, called Mr. Enlow into his office and discharged him. We discuss below the conflicting evidence presented by the parties regarding whether the termination of Mr. Enlow's employment was intended to be temporary or permanent, and whether Yellow Cab acted pursuant to a facially discriminatory employment practice to discharge employees over seventy years old.

Mr. Enlow filed a complaint in the district court on September 21, 2000 in which he alleged that Yellow Cab had violated the ADEA and Oregon Revised Statutes § 659.030(1)(a) (renumbered 659A.030(2)(a) in 2001), Oregon's parallel age discrimination statute. He prayed for front and back pay.

On May 18, 2001, Mr. Enlow filed a motion for partial summary judgment on this ADEA claim in which he argued that he had established "a prima facie case" of age discrimination under the ADEA by presenting evidence that he was seventy-three years old, had performed his job to his employer's satisfaction, and was discharged when his employer obtained less expensive automobile liability insurance that did not cover drivers over the age of seventy, while younger employees were retained. He maintained that he was entitled to prevail in the action because his age was the "but for" cause of his termination.

Yellow Cab filed a cross-motion for summary judgment on June 1, 2001 in which it argued that it was entitled to summary judgment because Mr. Enlow had not produced any evidence that Yellow Cab intended to discriminate against him based on his age. It stated: "For David Enlow to prevail, he must not only satisfy the prima facie requirements of an ADEA claim, but must produce evidence that Yellow Cab 'intended' to discriminate against him because of his age." Yellow Cab maintained that because Mr. Enlow failed to allege or produce evidence of discriminatory motive, he could not prevail under a ***811** disparate treatment theory of liability. Yellow Cab asserted that Mr. Enlow failed to present any evidence that Yellow Cab acted with discriminatory animus, or that its proffered reasons for terminating his employment were merely a pretext for impermissible discrimination.
The district court denied Mr. Enlow's partial motion for summary judgment and granted Yellow Cab's motion for summary judgment on November 26, 2001. The district court held that Mr. Enlow "failed to provide evidence of a discriminatory motive [on] the part of the Defendant in the decision to terminate Plaintiff." Mr. Enlow filed a timely notice of appeal of the order granting Yellow Cab's cross-motion for summary judgment, and the order denying his motion for partial summary judgment.[2]

Part One

[1] Mr. Enlow contends that the district court erred in granting Yellow Cab's motion for summary judgment. He maintains that he was not required to produce evidence that the proof relied upon by Yellow Cab to justify the termination of his employment was a pretext for impermissible discrimination in order to survive a motion

for summary judgment. He argues that the familiar *McDonnell Douglas* burden-shifting analysis should not apply to this case because he presented direct evidence that Yellow Cab terminated his employment because of his age.

We review a district court's grant of summary judgment de novo. *Frank v. United Airlines, Inc.,* 216 F.3d 845, 849(9th Cir.2000). We may affirm the district court's order granting summary judgment on any basis that is supported in the record. *San Jose Christian Coll. v. City of Morgan Hill,* 360 F.3d 1024, 1030 (9th Cir.2004).

Under the ADEA, employers may not "fail or refuse to hire or ... discharge any individual [who is at least forty years old] or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). In *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993), the Supreme Court identified two theories of employment discrimination: disparate treatment and disparate impact. *Id.* at 609, 113 S.Ct. 1701 (citing *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 335-36 n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)). In this appeal, Mr. Enlow relies solely on the disparate treatment theory of liability.

[2] [3] Disparate treatment is demonstrated when " '[t]he employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics].' " *Id.* (second alteration in original) (quoting *Teamsters,* 431 U.S. at 335 n. 15, 97 S.Ct. 1843). More recently, the Court instructed that " 'liability [in a disparate treatment claim] depends on whether the protected trait (under the ADEA, age) *actually* motivated the employer's decision.' " *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 141, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (emphasis added) (quoting *Hazen,* 507 U.S. at 610, 113 S.Ct. 1701). The Court held that "the plaintiff's age must have' actually played a role in [the employer's decision-making] process and had a determinative influence on the outcome.' " *Id.* (alteration in original) (quoting *Hazen,* 507 U.S. at 610, 113 S.Ct. 1701).

***812 [4] [5]** When a plaintiff alleges disparate treatment based on direct evidence in an ADEA claim, we do not apply the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) in determining whether the evidence is sufficient to defeat a motion for summary judgment. In *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985), the Supreme Court instructed that "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination." *Id.* at 121, 105 S.Ct. 613; *see also AARP v. Farmers Group, Inc.,* 943 F.2d 996, 1000 n. 7 (9th Cir.1991) (stating that "[o]rdinarily, however, when there is direct evidence of discrimination, such as when a provision[of a pension plan] is discriminatory on its face, the prima facie case analysis is inapplicable") Direct evidence, in the context of an ADEA claim, is defined as " 'evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude ... sufficient to permit the *fact finder* to infer that that attitude was more likely than not a motivating factor in the employer's decision.' " *Walton v. McDonnell Douglas Corp.,* 167 F.3d 423, 426 (8th Cir.1999) (alteration in original, emphasis added) (quoting *Radabaugh v. Zip Feed Mills, Inc.,* 997 F.2d 444, 449 (8th Cir.1993)).

[6] [7] The *McDonnell Douglas* formula applies under the ADEA where an employee must rely on *circumstantial* evidence that he or she was at least forty years old, met the requisite qualifications for the job, and was discharged while younger employees were retained. *Reeves,* 530 U.S. at 142, 120 S.Ct. 2097. It "creates a presumption that the employer unlawfully discriminated against the employee." *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Under *McDonnell Douglas,* if an employee presents prima facie circumstantial evidence of discrimination, the burden shifts to the employer to " 'produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.' " *Reeves,* 530 U.S. at 142, 120 S.Ct. 2097 (alteration in original) (quoting *Burdine,* 450 U.S. at 254, 101 S.Ct. 1089). This burden-shifting scheme is designed to assure that the " 'plaintiff [has] his day in court despite the unavailability of direct evidence.' " *Trans World Airlines,* 469 U.S. at 121, 105 S.Ct. 613 (alteration in original) (quoting *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1014 (1st Cir.1979)).

In his opposition to the motion for summary judgment, Mr. Enlow presented direct evidence that Yellow Cab permanently terminated his employment because he was seventy-three years old and the new insurance policy did not cover employees over the age of seventy. In an affidavit filed in support of his motion for summary judgment, Mr. Enlow declared that "[a]t no time did the defendant offer me an unconditional offer of re-employment." He further, stated that "[m]y understanding at the time of my termination was that I was terminated and would no longer be working for the Defendant." Thus, Mr. Enlow carried his "initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." *Teamsters,* 431 U.S. at 358, 97 S.Ct. 1843.

> [W]hen a plaintiff has established a prima facie inference of disparate treatment through *direct* or circumstantial evidence, he will *necessarily* have raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer's articulated reason for its employment decision.... When [the] evidence, ***813** direct or circumstantial, consists of more than the *McDonnell Douglas* presumption, a factual question will almost always exist with respect to any claim of a nondiscriminatory reason. The existence of this question of material fact will ordinarily preclude the granting of summary judgment.

Schnidrig v. Columbia Mach., Inc., 80 F.3d 1406, 1410(9th Cir.1996) (alterations in original, first emphasis added, internal quotation marks omitted) (quoting *Sischo-Nownejad v. Merced Cmty. Coll. Dist.,* 934 F.2d 1104, 1111 (9th Cir.1991)).

Yellow Cab presented evidence in opposition to Mr. Enlow's motion for partial summary judgment that the sole reason it *temporarily* terminated Mr. Enlow's employment was to prevent the City of Salem from closing its business doors because it lacked proof that each of its drivers was insured. In reviewing the district court's decision to grant Yellow Cab's motion for summary judgment, we must view the evidence in the light most favorable to Mr. Enlow. *Coleman v. Quaker Oats Co.,* 232 F.3d 1271, 1287 (9th Cir.2000).

The district court granted Yellow Cab's motion for summary judgment because it concluded that Mr. Enlow failed to produce evidence that Yellow Cab had a discriminatory motive for terminating Mr. Enlow's employment. In reaching this conclusion, the district court erroneously applied the *McDonnell Douglas* burden-shifting analysis. Mr. Enlow presented direct evidence that would support an inference that his employment was terminated because he was over the age of seventy. By granting summary judgment in favor of Yellow Cab, the district court denied Mr. Enlow his day in court " 'with respect to the legitimacy or bona fides of [Yellow Cab's] articulated reason for its employment decision.' " *Sischo-Nownejad,* 934 F.2d at 1111(quoting *Lowe v. City of Monrovia,* 775 F.2d 998, 1009 (9th Cir.1985)).

Part Two

Mr. Enlow also seeks reversal of the order denying his motion for partial summary judgment in his ADEA claim. He maintains that he is entitled to summary judgment without a trial because he has presented direct evidence that his employment was terminated because employees who are more than seventy years old are not covered under the Star Insurance policy. He requests that we instruct the district court to enter judgment in his favor.

It is undisputed that Yellow Cab did not purchase the Star Insurance policy in order to discriminate against employees younger than twenty-three and older than seventy years of age. In his supplemental brief to this court, Mr. Enlow concedes that Yellow Cab was not aware of the Star Insurance policy's discriminatory provision when it purchased it.

In reviewing the denial of Mr. Enlow's motion for partial summary judgment, we must view the evidence in the light most favorable to Yellow Cab. *Coleman,* 232 F.3d at 1287. In response to Mr. Enlow's motion, Yellow Cab offered evidence that Mr. Enlow's employment was not permanently terminated. Mr. Haley, Yellow Cab's personnel manager, declared in his affidavit that "the only reason why Mr. Enlow was terminated was because the company made a switch in auto insurance carriers and the new carrier did not insure drivers under twenty-three years of age or over the age of seventy. The saving in annual premium expense was the only reason why Yellow Cab switched insurance." He also alleged that "[a]t no time did Yellow Cab search for an insurance carrier who did not insure older workers in order to terminate Mr. Enlow's position with the company." Mr. Haley further stated that:

> ***814** Mr. Enlow was ... a commissioned employee. He was paid a percentage of the fares he took in. All of his taxes and expenses were paid out of his share of the gross fares. Terminating Mr. Enlow did not have any direct economic benefit in that Yellow Cab did not experience a savings in unpaid salaries or benefits. Indeed, terminating a driver actually made Yellow Cab one more driver short.

Mr. Gary Anderson, Yellow Cab's Secretary/Treasurer, declared that Yellow Cab adopted the new Star Insurance policy without knowledge that it did not insure drivers over the age of seventy or under the age of twenty-three. He stated that Yellow Cab did not learn of the age limitation until 4:00 p.m., on the day before it was required to provide proof of insurance to the City of Salem or face the loss of its business license. Mr. Anderson declared that the possibility of renewing its old insurance policy "was no longer available" at the time Yellow Cab learned of the

new policy's age limitation.

Yellow Cab also produced evidence that Mr. Haley had indicated to Mr. Enlow that the termination of his employment was only "temporary until coverage could be resolved or obtained." Immediately following Mr. Enlow's termination, Mr. Anderson made several phone calls on Mr. Enlow's behalf. Mr. Anderson declared: "I personally called Cherry City cab company in order to find Mr. Enlow work while we sorted out the insurance coverage problem." Mr. Anderson was successful in securing a job interview for Mr. Enlow with the Blue Jay Cab Company. Mr. Enlow was hired to begin work with the Blue Jay Cab Company within a week of the termination of his employment with Yellow Cab.

Finally, Yellow Cab introduced evidence that after it discharged Mr. Enlow, Mr. Anderson spoke with representatives at Star Insurance to see if they would waive the age restriction in their policy so that Mr. Enlow could be reemployed. Mr. Anderson declared: "I was able to talk the insurance carrier into considering Mr. Enlow for insurance if he would be willing to consider submitting to a medical check-up." Yellow Cab then presented Mr. Enlow with the option of taking a physical examination with the hope that Star Insurance would agree to insure Mr. Enlow on the basis of a clean bill of health. Mr. Anderson stated in his affidavit that "Mr. Enlow indicated that he would not agree to a physical and declined the offer to return to Yellow Cab." This evidence directly conflicts with Mr. Enlow's allegation that he was *permanently* terminated from his employment solely because of his age.

[8] Viewed in the light most favorable to Yellow Cab, this evidence shows that it did not permanently terminate Mr. Enlow's employment because he was more than seventy years old. Instead, Yellow Cab's evidence shows that Mr. Enlow was temporarily discharged to avoid termination of Yellow Cab's business license while it negotiated with Star Insurance to waive the age exclusion provisions in its policy. As a demonstration of its intent to protect Mr. Enlow's employment rights, Yellow Cab successfully obtained temporary employment for him with another cab company. Yellow Cab also obtained Star Insurance's tentative agreement to waive the age-based exclusion of coverage if Mr. Enlow would submit to a physical examination. Mr. Enlow rejected Star Insurance's willingness to consider waiving its age exclusion provisions if he could pass a physical examination. He also declined Yellow Cab's offer to reemploy him. The evidence offered by Yellow Cab presents a genuine issue of material fact regarding whether it can demonstrate at trial that its ***815** employment decision "falls within one of the exceptions to the ADEA's prohibitions." *EEOC v. Santa Barbara,* 666 F.2d 373, 375 (9th Cir.1982) (citations omitted). The ADEA provides that "[i]t shall not be unlawful for an employer ... to take any action otherwise prohibited under ... this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age...." 29 U.S.C. § 623(f)(1). "The validity of a BFOQ turns upon factual findings, preferably ones by a jury." *EEOC v. Boeing Company,* 843 F.2d 1213, 1216 (9th Cir.1988).

Whether a BFOQ or RFOA defense will sustain a judgment in favor of Yellow Cab will depend on the resolution of disputed factual issues which can only be resolved by a trier of fact regarding the employment action Yellow Cab actually took, such as, whether Mr. Enlow's discharge was temporary or permanent, was subject to a medical test, did he refuse an offer of reinstatement, was he laid off solely for the time necessary for Yellow Cab to obtain insurance coverage for him, and whether it was prohibitively expensive to insure drivers over seventy. We cannot decide on the sharply disputed facts in this record which version of the facts will be persuasive to a jury, and which party should prevail on appeal as a matter of law. Thus, we express no view at this interlocutory stage of these proceedings regarding the principles of law that will be applicable after the jury has made its findings and we have a complete record of the relevant facts. The district court did not err in denying Mr. Enlow's motion for partial summary judgment.

Conclusion

We conclude that Mr. Enlow presented sufficient direct evidence to support an inference that Yellow Cab's decision to terminate his employment was based on the fact that he was more than seventy years of age. For that reason, the district court erred in granting Yellow Cab's motion for summary judgment on the ground that Mr. Enlow failed to present any evidence that Yellow Cab acted with discriminatory animus.

We also hold that Yellow Cab presented sufficient evidence to raise a genuine issue of disputed fact regarding whether Mr. Enlow was permanently discharged because of his age, or whether it has a viable BFOQ or a RFOA affirmative defense based on its evidence that a temporary discharge was necessary to avoid losing its business license because all of its employees were not covered by automobile liability insurance. The district court did not err in denying Mr. Enlow's partial motion for summary judgment. Because there are genuine issues of material fact in dispute, we reject Mr. Enlow's request that we instruct

the district court to grant his motion for summary judgment.

We **VACATE** the order granting Yellow Cab's motion for summary judgment and **AFFIRM** the order denying Mr. Enlow's motion for partial summary judgment.

Each side shall bear its own costs.

FERGUSON, Circuit Judge, concurring in part and dissenting in part.

I concur in the majority's decision to vacate the grant of summary judgment in favor of defendant Salem-Keizer Yellow Cab. But I dissent from the majority's denial of summary judgment to plaintiff David Enlow. The majority have bought Yellow Cab's implosive position that when it purchased a new insurance policy that reduced its premium payments by more than $10,000 per year, it did not know the terms or conditions of the new policy or ***816** why it was so much less expensive than its old policy. The Age Discrimination in Employment Act ("ADEA") does not protect an employer whose deliberate indifference toward its business policies leads it to terminate employees in violation of the ADEA.

Additionally, the majority have bought another implosive belief that the ADEA does not apply when an employee covered under the ADEA is discharged only temporarily for economic reasons. Temporary termination is not a defense under the ADEA; it qualifies under neither the bona-fide-occupational-qualification ("BFOQ") exception nor the reasonable-factor-other than-age ("RFOA") exception to the ADEA. Whether the termination was temporary or permanent will have an effect on the amount of damages eventually awarded but is not a factor in determining liability.

The uncontested facts establish a violation of the ADEA. Mr. Enlow, a 72-year-old cabdriver, was discharged from Yellow Cab because the company's new insurance policy did not cover drivers over 70. The majority remands this case to district court to determine whether Yellow Cab terminated Mr. Enlow temporarily on the basis of an ADEA exception. Yet it makes no difference regarding liability for discrimination whether the termination was permanent or temporary. The *only* question to be resolved is whether, as a matter of law, the ADEA is violated where an employer terminates a 72-year-old employee because the company's chosen insurance policy does not cover drivers over 70.

The answer to that question is without question. Where an employer intentionally uses age as a criterion for an employment decision, it is not a defense that the employer sought only to save costs. Nor can the employer escape liability by claiming that exigent circumstances excused its actions. The ADEA prohibited age discrimination while carefully enumerating several exceptions to the rule. *See* 29 U.S.C. § 623(f). None of these exceptions applies here. The majority's implicit creation of a new exception for age discrimination taken to reduce insurance costs dilutes the protections that Congress sought to provide for older workers.

I.

Yellow Cab contends that Mr. Enlow did not establish the discriminatory intent required for an ADEA disparate treatment claim, as described by *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993). In that case, the Supreme Court held that an employer does not violate the ADEA by terminating an older employee in order to prevent his pension benefits from vesting, even if pension status is correlated with age. *Id.* at 611-12, 113 S.Ct. 1701. The Court reasoned that age and pension status are "analytically distinct" and noted that a younger employee who has worked for a particular employer his entire career might be closer to qualifying for pension benefits than an older employee newly hired. *Id.* at 611, 113 S.Ct. 1701.

Yellow Cab claims that here, too, it discharged Mr. Enlow based on a classification-insurability-that is analytically distinct from age. Unlike the situation in *Hazen,* however, there is not merely a correlation between age and qualification for insurance coverage, but absolute identification: Mr. Enlow did not qualify for Yellow Cab's new insurance policy *because* he was over 70, and as a result, the company fired him. The cab company acknowledged that but for Mr. Enlow's age, he would not have been discharged. Thus, Mr. Enlow meets *Hazen's* requirement that an employee show that age "actually ***817** played a role in [the employer's decision-making] process and had a determinative influence on the outcome." 507 U.S. at 610, 113 S.Ct. 1701.

Yellow Cab's attempt to separate out insurability from age is unavailing. In *City of Los Angeles Dep't. of Water & Power v. Manhart,* the Supreme Court rejected the employer's argument that a plan requiring women to make larger monthly contributions to a pension plan than men was "based on the factor of longevity rather than sex." 435 U.S. 702, 712, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978). The Court stated: "It is plain ... that any individual's life expectancy is based on a number of factors, of which sex is only one.... [O]ne cannot say that an actuarial distinction

based entirely on sex is based on any other factor other than sex. Sex is exactly what it is based on." *Id.* at 712-13, 98 S.Ct. 1370(internal citations omitted). Here, too, an individual's insurance risk is based on numerous factors, but Mr. Enlow's inability to qualify for insurance coverage was based solely on age. The cab company cannot splice out insurability from age where, as in *Manhart,* the proffered basis for its employment practice coincides absolutely with a protected trait.

Nor can Yellow Cab escape liability by shifting blame to the insurance carrier that established the coverage limits. The Supreme Court held more than twenty years ago that an employer violated Title VII where the retirement plans offered to its employees provided lower monthly benefits to women, even though the discriminatory conditions were supplied by private insurers. *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris,* 463 U.S. 1073, 103 S.Ct. 3492, 77 L.Ed.2d 1236 (1983). The employer "cannot disclaim responsibility for the discriminatory features of the insurers' options" and violates Title VII "regardless of whether third parties are also involved in the discrimination." *Id.* at 1089, 103 S.Ct. 3492. Here, too, Yellow Cab is no less responsible for violating the ADEA because it did so in response to an insurance policy that it selected from a third party.

Furthermore, even assuming that the company was not motivated by stigmatizing stereotypes of older workers, Yellow Cab has violated the ADEA. *Hazen* explains that "[i]t is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." 507 U.S. at 610, 113 S.Ct. 1701. Congress enacted the ADEA in order to address the concern that "older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Id. Hazen* further stated that where an employer's decision is "*wholly* motivated by factors other than age," the problem presented by such stereotyping "disappears." *Id.* at 611, 113 S.Ct. 1701(emphasis added).

This interpretation of the ADEA's rationale, however, does not shield Yellow Cab. The majority believes that to establish disparate treatment, Mr. Enlow must still persuade a trier of fact by a preponderance of the evidence that Yellow Cab's motive in terminating him was intentionally discriminatory. But precedent is clear that in a case of facial discrimination, the explicit use of a protected trait as a criterion for the employer's action establishes discriminatory intent, regardless of the employer's subjective motivations. "Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." ***818** *Int'l Union, UAW v. Johnson Controls, Inc.,* 499 U.S. 187, 199, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991) (finding an employer's fetal-protection policy to be sex discrimination in violation of Title VII where it excluded women of child-bearing capacity from jobs exposing them to lead). There, the Supreme Court noted that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy...." *Id. See also Frank v. United Airlines, Inc.,* 216 F.3d 845, 854 (9th Cir.2000) (reaffirming that "where a claim of discriminatory treatment is based upon a policy which on its face applies less favorably to one gender ... a plaintiff need not otherwise establish the presence of discriminatory intent").

This Court has applied the principle, first established in Title VII cases, that an employer's subjective motivations are not controlling in a case of facial discrimination to claims under the ADEA. In *EEOC v. Borden's, Inc.,* for example, we stated that where a severance policy denied a benefit to workers 55 and older, no showing of the employer's ill will toward older people was required.1 724 F.2d 1390, 1393 (9th Cir.1984), *overruled on other grounds in Pub. Employees Ret. Sys. of Ohio v. Betts,* 492 U.S. 158, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989), *superseded by revision to* 29 U.S.C. §§ 621, 623.

Indeed, there is good reason to find discriminatory intent where an employer's decision or policy discriminates on its face: where differential treatment based on a protected trait is open and explicit, older workers are stigmatized on account of their age regardless of the employer's subjective motivations. Moreover, although there is no evidence that Yellow Cab itself espoused stereotypes of older workers, by dismissing Mr. Enlow because of an insurance policy that did not cover drivers over 70, Yellow Cab ratified the insurance company's categorical judgment that drivers over 70 were not competent.

Whatever the rights of the insurance business to set coverage limits as it deems appropriate, Yellow Cab's termination of an older employee based on the new policy's age exclusion implicated the stigmatizing stereotypes to which *Hazen* refers. Mr. Enlow's dismissal falls squarely within the range of discriminatory employment actions that the ADEA sought to prevent.

II.

Although Mr. Enlow's dismissal constitutes facial discrimination under the ADEA, the majority believes that Yellow Cab's decision to terminate Mr. Enlow potentially falls within an established ADEA exception. In particular,

the majority suggests that Yellow Cab qualifies for a BFOQ or a RFOA exception to the ADEA, both of which insulate a defendant from liability for discrimination. The majority, however, misconstrues both ADEA exceptions: discharging an employee, even if only temporarily, to save costs never justifies age-based discrimination under any exception.

A. *Bona Fide Occupational Qualification ("BFOQ") Exception*

As a preliminary matter, the affirmative BFOQ defense set forth in § 4(f)(1) of the ADEA is inapplicable in this case because Yellow Cab failed to raise it in its motion ***819** for summary judgment. The Supreme Court has repeatedly described the BFOQ defense as an affirmative defense, *Johnson Controls, Inc.,* 499 U.S. at 206, 111 S.Ct. 1196, *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 112, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985), which the Federal Rules of Civil Procedure requires to be specifically pleaded. Fed.R.Civ.P. 8(c). Failure to plead an affirmative defense therefore results in a waiver of that defense. *See Bank Leumi Le-Israel, B.M. v. Lee,* 928 F.2d 232, 235 (7th Cir.1991). Since Yellow Cab did not specifically plead the BFOQ defense in its motion for summary judgment, Yellow Cab effectively waived this defense.

More importantly, even if Yellow Cab were permitted to raise the BFOQ defense in district court, the defense would nonetheless fail as a matter of law. The majority believes that to establish a BFOQ defense, Yellow Cab need only prove that it terminated Mr. Enlow temporarily and not in bad faith. The majority repeatedly states that according to Yellow Cab, the termination of Mr. Enlow was to be temporary. The opinion does not explain, however, why this would make a difference. The ADEA prohibits age discrimination "with respect to ... compensation, terms, conditions, or privileges of employment ...". 29 U.S.C. § 623(a)(1). It does not only prohibit "permanent" termination. Thus, although this fact is contested, it is not a *material* fact requiring us to remand the case.

The Supreme Court has established that the BFOQ defense is a narrow exception to the ADEA that only applies in special situations. *See Johnson Controls, Inc.,* 499 U.S. at 201, 111 S.Ct. 1196; *Western Air Lines, Inc. v. Criswell,* 472 U.S. 400, 412, 105 S.Ct. 2743, 86 L.Ed.2d 321 (1985); *Dothard v. Rawlinson,* 433 U.S. 321, 334, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). In particular, the BFOQ defense applies only in situations where an employer who discriminates on the basis of age demonstrates that "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). Thus, one of the elements that a defendant invoking the BFOQ defense must satisfy is that its age-based discrimination relates to a "particular business," which the Supreme Court defined in *Thurston* as the particular job from which the protected individual is excluded. 469 U.S. at 122, 105 S.Ct. 613.

In *Thurston,* more specifically, the Supreme Court held that Trans World Airlines' ("TWA's") discriminatory transfer policy was not permissible under § 4(f)(1) because age is not a BFOQ for the "particular" position of flight engineer. *Id.* The transfer policy explicitly allowed airplane captains displaced for reasons other than age to "bump" less senior flight engineers. *Id.* Those captains disqualified from their position after reaching the age of 60, however, were denied the transfer privilege altogether because of their age. *Id.* The Court determined that a BFOQ defense was meritless because age is not a BFOQ for the position of flight engineer. *Id.* at 123, 105 S.Ct. 613. TWA had actually employed at least 148 flight engineers who were over 60 years old, thereby defeating the contention that captains over 60 years old were too old or incapable of performing as flight engineers. *Id.* n. 18.

Here, too, Yellow Cab's discriminatory insurance policy is not permissible under § 4(f)(1) because age is not a BFOQ for the particular position of cab driver. Yellow Cab's own pleadings acknowledge that Mr. Enlow, a nineteen-year employee of the company, maintained a solid job performance. In addition, Yellow Cab's supplemental brief to this Court reiterated that the cab company did not consider Mr. ***820** Enlow to be an unsafe driver. Accordingly, Mr. Enlow's age did not affect his ability to carry out his duties for Yellow Cab; he was neither incapable of performing his job, *see Johnson Controls,* 499 U.S. at 201, 111 S.Ct. 1196 (explaining that an age-based BFOQ defense must relate to the employee's occupation, including his *ability* to do the job) (emphasis added), nor a potential safety risk, *see Criswell,* 472 U.S. at 419, 105 S.Ct. 2743 (finding that an age-based BFOQ purportedly justified by safety interests must be "reasonably necessary" to the overriding interest in public safety). Thus, Mr. Enlow's dismissal, despite his continued ability, violated the "particular business" requirement of the BFOQ defense.

Furthermore, we have refused to consider economic costs as a basis for a BFOQ defense. The majority opinion recites at length Yellow Cab's claim that it laid off Mr. Enlow solely for the time necessary for Yellow Cab both to avoid termination of its business license and to negotiate with Star Insurance to waive the age exclusion provisions in its policy. In *EEOC v. County of Los Angeles,* 706 F.2d 1039, 1042 (9th Cir.1983), however, we stated that "[e]conomic considerations ... [could not] be the basis for a BFOQ-precisely those considerations were among the

targets of the Act."[2] As a result, it is irrelevant whether Yellow Cab terminated Mr. Enlow temporarily or because it failed to exercise rational business judgment in purchasing an insurance policy the terms and conditions of which it did not know.

In an effort to save costs, Yellow Cab ultimately adopted a new insurance policy that did not cover drivers over 70, and, consequently, discriminated against Mr. Enlow. Even though Yellow Cab's previous insurance policy covered drivers over 70, Yellow Cab nonetheless chose a new policy that effectively saved the company $10,000 in annual insurance premiums. But Yellow Cab made this business decision at Mr. Enlow's discriminatory expense. An employer's deliberate indifference toward a new discriminatory policy it chooses to adopt is therefore no excuse for age discrimination.

B. *Reasonable Factors Other than Age ("RFOA") Exception*

Although Yellow Cab invoked, and both parties addressed, the affirmative RFOA defense in their motions for summary judgment, the defense fails as a matter of law as well. Yellow Cab asserted below that its employment decision fell within the ADEA exception for actions taken "where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). Here, however, Yellow Cab differentiated Mr. Enlow from other drivers precisely and only because of his age-making the defense inapplicable. *See EEOC v. Johnson & Higgins, Inc.,* 91 F.3d 1529, 1541 (2d Cir.1996) ("By its terms, the statute supplies an exception for 'age-neutral' decisions based on other factors such as health or even education that might be correlated with age ... not an exception for policies that explicitly but reasonably discriminate based on age."). Moreover, ***821** the Equal Employment Opportunity Commission ("EEOC") regulations interpreting the ADEA state that the "reasonable factors other than age" defense is unavailable where an "employment practice uses age as a limiting criterion...." 29 C.F.R. § 1625.7(c).

The EEOC regulations also provide that a "differentiation based on the average cost of employing older [workers] ..." does not qualify under this exception. 29 C.F.R. § 1625.7(f). Citing that regulation, the Eleventh Circuit rejected a cost-savings defense in a case with almost identical facts as the case before us. In *Tullis v. Lear Sch., Inc.,* 874 F.2d 1489 (11th Cir.1989), a private school fired a 66-year-old bus driver because its insurance carrier only covered drivers 65 or younger. The Eleventh Circuit ruled that the school's decision to dismiss the driver was based on his age, *id.* at 1490-91, and that the increased insurance cost for the school did not exempt it from complying with the ADEA. *Id.* at 1490.

III.

Mr. Enlow's claim of age discrimination should be granted on summary judgment. There are no material facts for a trier of fact to determine. As a matter of law, the termination of an employee because he is older than the age limitation of his employer's insurance policy violates the ADEA, even if the employer chose that policy to save money. Had Yellow Cab terminated a female employee because its insurance policy did not cover women, or discharged an Asian employee because its insurance excluded Asians, we would surely have repudiated those actions. As certainly, Yellow Cab's decision to terminate a 72-year-old cabdriver because its new insurance excluded drivers over 70 deserves our censure. Anti-discrimination law would mean nothing if an employer could justify a facially discriminatory action by invoking the bottom line of its profit and loss statement.

Parallel Citations

104 Fair Empl.Prac.Cas. (BNA) 301, 04 Cal. Daily Op. Serv. 9817, 2004 Daily Journal D.A.R. 13,447

Footnotes

* Pursuant to Rule 37(b) of the Fed.R.Civ.P., the parties consented to have a United States Magistrate Judge conduct any and all proceedings in this case.

1 Salem Revised Code, Title 3, Ch. 30.124 requires as follows:

> Whenever any ... policy of insurance is required in connection with any license required by this title, the maintenance thereof in full force and effect shall be a condition of the validity of any license issued under this chapter. Upon receiving information that such ... insurance is, for any reason, no longer in full force and effect, the director shall summarily suspend such license.

2 On this appeal, Mr. Enlow has abandoned his state age discrimination claim. *See Big Bear Lodging Ass'n v. Snow Summit, Inc.,* 182 F.3d 1096, 1105 (9th Cir.1999) ("Issues appealed but not briefed are deemed abandoned.").

1 *Borden's* held that a policy that denied severance pay only to employees who were eligible for retirement constituted disparate

treatment. 724 F.2d at 1393. While that holding may not survive *Hazen,* the *Borden's* analysis of the intent required in facial discrimination cases is still apt. Moreover, in a case decided after *Hazen,* the Third Circuit found a separate inquiry into an employer's subjective motivations unnecessary in a case of facial age discrimination. *See DiBiase v. SmithKline Beecham Corp.,* 48 F.3d 719, 726 (3d Cir.1995).

2 Other circuits agree that economic considerations, unlike job-related safety concerns, are not a basis for the BFOQ defense. *See Leftwich v. Harris-Stowe State Coll.,* 702 F.2d 686, 692 (8th Cir.1983) (stating that "economic savings derived from discharging older employees cannot serve as legitimate justification under the ADEA for an employment selection criterion"); *Smallwood v. United Air Lines, Inc.,* 661 F.2d 303, 307 (4th Cir.1981) (holding that the economic burdens involved in hiring older pilots was not grounds for a BFOQ exception that justified United Airlines' age-based discrimination policy against hiring older pilots).

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2010 WL 2813361
Only the Westlaw citation is currently available.
United States District Court, D. Idaho.

Jeffrey Lawrence ENNIS and Sandra V. Ennis, Plaintiffs,
v.
BOUNDARY COUNTY, Boundary County Commissioners Dan Dinning, Ron Smith, and Walt Kirby, in their individual and official capacity; Boundary County Sheriff's Department, Boundary County Sheriff Greg Sprungl, in his individual and official capacity, Richard Stephens, in his individual and official capacity, Defendants.

No. CV-09-0449-N-BLW. | July 15, 2010.

Attorneys and Law Firms

Larry Dean Purviance, Larry D. Purviance Attorney at Law, Hayden, ID, for Plaintiffs.

Jennifer Fegert, Peter C. Erbland, Paine Hamblen Coffin Brooke & Miller, Coeur D'Alene, ID, for Defendants.

Opinion

MEMORANDUM DECISION AND ORDER

WM. FREMMING NIELSEN, Senior District Judge.

*1 Pending before the Court is Defendants' Motion for Summary Judgment (Docket No. 10). A hearing on the Motion was held July 13, 2010. Plaintiffs were represented by Larry Purviance; Defendants were represented by Peter Erbland. The Court has reviewed the file and written pleadings and heard oral argument from counsel. For the reasons explained below, the Court will grant the motion.

BACKGROUND

Plaintiff Jeffrey Ennis contends that Defendant Greg Sprungl terminated Ennis because he ran against Sprungl in the 2008 election for Boundary County Sheriff. Defendants contend that Ennis was terminated because he lacked POST certification as a peace officer, which Idaho law requires.

Ennis was employed as a detention deputy for the Boundary County Sheriff's Office from March 3, 1997 through March 19, 2009. (Sprungl Aff., ¶ 9). Sprungl was the Sheriff of Boundary County at the time of Ennis' hiring and termination. (Sprungl Aff., ¶ 5). However, Sprungl lost his re-election and position as Sheriff to Greg Voyles in 2000. (Sprungl Aff., ¶ 4). Sprungl was not Sheriff between January 2001 and November 2004, after which he was re-elected. (Sprungl Aff., ¶ 5). One of a sheriff's duties is to oversee the training and certification of all detention officers. (Sprungl Aff. ¶ 7).

Under Idaho law, any county detention officers employed before July 1, 1997 must be trained and certified through the Peace Officer's Standards and Training ("POST") Academy by July 1, 1999. (Idaho Code § 19-5117(2)). Additionally, a sheriff does not have the power to retain a deputy if the deputy has not become POST certified within one year of his employment. (Fegert Aff., Exh. A). Ennis was not POST certified as a peace officer during the course of his employment. (Sprungl Aff., ¶ 18).

Sprungl alleges that he advised Ennis about POST certification when Ennis was initially hired. (Sprungl Aff., ¶ 10). Ennis alleges that he did not receive notice about his lack of POST certification until January 2005. (Ennis Aff., ¶ 4). Ennis announced his intention to run against Sprungl for county Sheriff sometime in either June or early July 2008. (Ennis Aff. ¶ 4). Ennis ran against Sprungl, but Sprungl was again re-elected and re-took title as Sheriff. (Sprungl Affidavit, ¶ 6). After his announcement, Ennis contends that Sprungl took immediate action to terminate him. (Ennis Aff., ¶ 4).

On June 20, 2008, Sprungl notified Ennis in writing that he must complete certain requirements to obtain proper certification. (Sprungl Aff, ¶ 13, Exh. A). Ennis attempted to complete the applications for both POST training and certification, as well as a certification waiver during this time. (Sprungl Aff. ¶ 16, Exh. C). For the next six months, correspondence between Sprungl, Ennis and the POST Academy indicates disagreements as to whether Ennis completed his application for certification. (Sprungl Aff., ¶¶ 17-23, Exhs. D-G).

*2 Ennis withdrew his application for new POST certification in January 2009. (Sprungl Aff., ¶ 22; Ennis Aff., ¶ 8). Sprungl submitted Ennis' application to the POST Academy anyway. (Sprungl Aff., ¶ 24, Exh. H). The POST Academy later notified Sprungl that Ennis did not meet minimum health and administrative standards (Sprungl Aff., ¶ 24, Exh. H), therefore Ennis was not

eligible for certification. (Id.). Sprungl placed Ennis on suspension then terminated him on March 19, 2009. (Sprungl Aff., ¶ 29, ¶ 32, Exh. J). Sprungl cited lack of POST certification as the reason for termination. (Sprungl Aff., ¶ 32, Exh. L).

ANALYSIS

1. Summary Judgment Standard of Law

One of the principal purposes of the summary judgment "is to isolate and dispose of factually unsupported claims ...." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). It is "not a disfavored procedural shortcut," but is instead the "principal tool[ ] by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." *Id.* at 327. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The evidence must be viewed in the light most favorable to the non-moving party, *id.* at 255, and the Court must not make credibility findings. *Id.* Direct testimony of the nonmovant must be believed, however implausible. *Leslie v. Grupo ICA,* 198 F.3d 1152, 1159 (9th Cir.1999). On the other hand, the Court is not required to adopt unreasonable inferences from circumstantial evidence. *McLaughlin v. Liu,* 849 F.2d 1205, 1208 (9th Cir.1988).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Devereaux v. Abbey,* 263 F.3d 1070, 1076 (9th Cir.2001) (en banc). To carry this burden, the moving party need not introduce any affirmative evidence (such as affidavits or deposition excerpts) but may simply point out the absence of evidence to support the nonmoving party's case. *Fairbank v. Wunderman Cato Johnson,* 212 F.3d 528, 532 (9th Cir.2000).

This shifts the burden to the non-moving party to produce evidence sufficient to support a jury verdict in her favor. *Id.* at 256-57. The non-moving party must go beyond the pleadings and show "by her affidavits, or by the depositions, answers to interrogatories, or admissions on file" that a genuine issue of material fact exists. *Celotex,* 477 U.S. at 324. The Court is "not required to comb through the record to find some reason to deny a motion for summary judgment." *Carmen v. San Francisco Unified Sch. Dist.,* 237 F.3d 1026, 1029 (9th Cir.2001) (quoting *Forsberg v. Pac. Northwest Bell Tel. Co.,* 840 F.2d 1409, 1418 (9thCir.1988)). Instead, the "party opposing summary judgment must direct [the Court's] attention to specific triable facts." *Southern California Gas Co. v. City of Santa Ana,* 336 F.3d 885, 889 (9th Cir.2003). Statements in a brief, unsupported by the record, cannot be used to create an issue of fact. *Barnes v. Independent Auto. Dealers,* 64 F.3d 1389, 1396 n. 3 (9th Cir.1995).

2. Defendants' Motion for Summary Judgment

***3** Defendants move for summary judgment in this case, and dismissal of Plaintiffs' Complaint in its entirety. In his Complaint, Plaintiff raises First, Fourth, Fifth, and Fourteenth Amendment claims against Defendants under 42 U.S.C. § 1983. Defendants' Motion addresses the First and Fourteenth Amendment claims, and raises various other challenges to Defendants' liability. Plaintiff's Response addresses only his First Amendment claim.

A. Plaintiff's First Amendment claim

In alleging violations of his constitutional rights, Ennis invokes 42 U.S.C. § 1983. To state a claim under § 1983, the plaintiff must (1) establish the deprivation of a right secured by the U.S. Constitution or federal law and (2) establish that the deprivation was committed by a person acting under color of state law. *Amer. Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 49-50, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999). Ennis claims that the Defendants deprived him of his First Amendment right to free speech by terminating him after he announced his intention to run for public office.

To evaluate a § 1983 First Amendment retaliation claim, the Court must conduct a five-step inquiry. *Eng v. Cooley,* 552 F.3d 1062, 1070 (9th Cir.2009). First, the plaintiff bears the burden of showing: (1) whether the plaintiff spoke on a matter of public concern, (2) whether the plaintiff spoke as a private citizen or public employee and (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action. *Id.* If the plaintiff satisfied the first three steps, the burden shifts to the government to show (4) whether the state had an adequate justification for treating the employee differently from other members of the general public and (5) whether the state would have taken the adverse employment action regardless of the protected speech. *Id.*

Using the test outlined in *Eng* is appropriate for two reasons. First, in a § 1983 action that involves both

political patronage and retaliation under the First Amendment, conducting a retaliation analysis goes to the heart of the case. *Thomas v. Carpenter,* 881 F.2d 828, 829 (9th Cir.1989). In *Thomas,* plaintiff was a lieutenant officer who ran against his supervisor, Sheriff Carpenter, in a public election. After Thomas lost the election, he alleged that Carpenter retaliated against him by banning Thomas from department meetings and the like. *Id.* The court found an inquiry into First Amendment retaliation and not political patronage-which involves a completely different analysis-was proper.
Second, the Ninth Circuit recognized that "[i]n the forty years since *Pickering,* First Amendment law has evolved dramatically, if sometimes inconsistently." *Eng,* 552 F.3d at 1070. The Ninth Circuit created this test after "unraveling *Pickering'* s tangled history" and thus the test is appropriate to use for First Amendment retaliation cases. *Id.*1

(1) *Public concern and private citizen*

***4** First, the parties do not dispute that running for public office is a public concern. Conduct must be related to issues of political, social or other concerns to the community sufficient to satisfy the First Amendment. *Connick v. Myers,* 461 U.S. 138, 146-147, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). Ennis announced his intention to run, then ran, as a candidate in the 2008 election for sheriff of Boundary Countya public concern. Second, the parties do not dispute that Ennis acted as a private citizen when he ran for sheriff in 2008. A public employee acts like a private citizen when he performs acts outside of his daily professional responsibilities. *Garcetti v. Ceballos,* 547 U.S. 410, 422, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). Running for public office was not part of Ennis' professional responsibilities as a detention deputy. Therefore, Ennis' speech is entitled to First Amendment protection. *Id.*

(2) *Substantial or motivating factor*

Third, Ennis must show that running for sheriff against Sprungl was a substantial or motivating factor in the state's action to terminate him. This is an element of causation and "purely a question of fact." *Eng v. Cooley,* 552 F.3d at 1071. Accordingly, the Ninth Circuit has listed three ways in which a plaintiff can raise a genuine issue of material fact. *Keyser v. Sacramento City Unified Sch. Dist.,* 265 F.3d 741, 744 (9th Cir.2001). First, a plaintiff may introduce evidence regarding proximity in time between the protected action and the retaliatory employment decision, from which a jury could infer retaliation. *Id.* Second, a plaintiff may introduce evidence that his employer expressed opposition to his speech. *Id.* Finally, the plaintiff may introduce evidence that his employer's proferred explanations for the adverse employment actions were false and pre-textual. *Id.* Defendants do not dispute that they had knowledge of Ennis' speech.

Ennis showed that despite his lack of POST certification for almost eleven years, Sprungl did not take formal action to demand certification until after Ennis ran against Sprungl in the 2008 election. About eight months passed between Ennis' announcement running against Sprungl and Ennis' termination. Depending on the circumstances, an eleven month gap can support an inference of First Amendment retaliation. *Allen v. Iranon,* 283 F.3d 1070, 1078 (9th Cir.2002). The Ninth Circuit cautions that mechanical application of a specified time period is unrealistically simplistic, however this only applies when a court states that a time period is too lengthy to support an inference of retaliation. *Anthoine v. North Central Counties Consortium,* 605 F.3d 740, 751 (9th Cir.2010) (*citing Coszalter v. City of Salem,* 320 F.3d 968, 978-979 (9th Cir.2003)). Given Sprungl's inability to enforce the certification policy for ten years prior, an eight month and two week period could reasonably lead a jury to infer retaliation from protected speech.
Ennis alleges that Sprungl sabotaged Ennis' attempts to apply for a POST certification waivers throughout his employment. However, the plaintiff must show evidence that his termination was "designed to retaliate against and chill political expression." *Butler v. Elle,* 281 F.3d 1014, 1028 (9th Cir.2002) (*quoting Gibson v. United States,* 781 F.2d 1334, 1338 (9th Cir.1986)). To support a retaliation claim, the record must demonstrate a constitutional violation. *Id.* The alleged sabotage does not relate to Ennis' First Amendment claim because his waiver attempt occurred three years before running against Sprungl. It is beyond the scope of his cause of action and is not evidence of retaliation. Additionally, while Defendants assert that Ennis had the burden of submitting his own application, the point is moot under *Butler.*2

***5** At hearing, Plaintiff focused largely on whether Defendants adequately assisted his pursuit of a waiver of POST certification requirements. However, Plaintiff made no mention of the waiver argument in briefing to the Court, except for references in Ennis' Affidavit. Additionally, Sprungl was not Sheriff for several years of Ennis' employment in Boundary County. This casts doubt on Ennis' allegations. The Court finds that Plaintiff has failed to demonstrate bad faith on the part of Defendants in failing to submit Plaintiff's waiver packet.

Regardless, Ennis has fulfilled his burden of proof under *Eng.* He meets the first two steps of the *Eng* test and has raised a genuine issue of material fact on the third step. The

burden thus shifts to Defendants to prove the fourth and fifth prongs of the *Eng* test.

(3) *Adverse employment action regardless of protected speech*

Defendants are entitled to summary judgment if they can demonstrate that they would have terminated Ennis regardless of his protected conduct. *Eng,* 552 F.3d at 1072. Again, Defendants bear the initial burden of demonstrating the absence of a genuine issue of material fact. *Devereaux,* 263 F.3d at 1076. While courts will normally look into the fourth prong of the *Eng* test, Defendants did not address it. However, Defendants have shown that Ennis would have been terminated absent his running in an election against Sprungl.

The fifth prong asks whether the Defendants can show Ennis' protected speech was not a but-for cause of the adverse employment action. *Eng,* 552 F.3d at 1072. Even if the protected conduct was a substantial factor in deciding to terminate, the Constitution "is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct." *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 285-286, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). This principle is especially true if the consequences of allowing the terminated employee to continue employment are significant. *Id.* at 286.

However, the Defendants must show that it *would* have terminated Ennis, not that it *could* have. *Settlegoode v. Portland Public Schools,* 371 F.3d 503, 512 (9th Cir.2004) (*see also Gillette v. Delmore,* 886 F.2d 1194 (9th Cir.1989)). Again, this inquiry is "purely a question of fact." *Robinson v. York,* 566 F.3d 817, 825 (9th Cir.2009). At the same time, district courts have broad discretion to determine an official's intent with regards to alleged § 1983 violations at the summary judgment stage. *Crawford-El v. Britton,* 523 U.S. 574, 600-601, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998).

Under § 19-5117(2), all detention deputies must be POST trained and POST certified to have the authority to act as peace officers. Defendants have shown that Ennis was required by law to be POST certified. Ennis was not qualified for certification because he failed to meet minimum health and application requirements. Because Ennis never attained certification, he had no authority to be a peace officer in Boundary County. The Parties agree that Ennis has received no POST certification.

***6** Defendants assert two additional facts to show a lack of but-for causation.

First, the parties agree that Ennis had notice of the certification requirement at least three years before he exercised his protected speech. Second, allowing Ennis to continue his employment as an uncertified officer would involve significant consequences. Employing an uncertified officer would subject Ennis, Sprungl and Boundary County to "grave consequences[,]" such as civil and criminal penalties. (Fegert Aff. Exh. A).

Defendants have not justified why it took ten years to terminate Ennis under § 19-5117(2) when they had statutory authority to do so. However, no reasonable juror could find that Ennis was entitled to a job that he held unlawfully. Even if Ennis can show triable facts of improper motive, his termination placed him in no worse position than if he had not run for sheriff's office.

In his response, Ennis cites generally to *Allen v. Irano* as "indistinguishable" from the facts at hand. When responding to a motion for summary judgment, the non-moving party must go beyond the pleadings and show that a genuine issue of material fact exists. *Celotex,* 477 U.S. at 324. Ennis expects his First Amendment retaliation claim to be vindicated without analysis. However, he has not shown how *Allen* raises a genuine issue of fact.

A salient difference between this cause of action and *Allen* is that Allen was legally entitled to his job, unlike Ennis. 283 F.3d at 1079. Based on this brief analysis, and lack direction from Ennis, the case is not sufficient to establish a genuine issue of material fact as to Ennis' claim. Accordingly, the Court should grant Defendants' motion for summary judgment on Ennis' First Amendment claim.

B. Defendants' immunity claims

(1) *Qualified immunity: Sheriff Sprungl*

"Qualified immunity serves to shield government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose,* 402 F.3d 962, 971 (9th Cir.2005) (*quoting Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). However, a state official may be held personally liable in a § 1983 action if he knew or should have known that he was violating plaintiff's constitutional rights. *Harlow,* 457 U.S. at 818.

A qualified immunity analysis consists of two prongs. *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) (citing *Siegert v. Gilley,* 500 U.S. 226, 232, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991)). First,

whether taken in a light most favorable to the party asserting the injury, the facts alleged show that the defendant's conduct violated a constitutional right. *Id.* Second, whether that right was clearly established. *Id.* The relevant, dispositive inquiry into the second prong is whether it would be clear to a reasonable defendant that his conduct was unlawful in the particular situation he confronted. *Saucier,* 533 U.S. at 202.

*7 Courts may use their sound discretion to decide which of the two prongs should be addressed first. *Pearson v. Callahan,* --- U.S. ----, 129 S.Ct. 808, 818, 172 L.Ed.2d 565 (2009). Finally, the plaintiff bears the burden of proving that his rights were clearly established at the time of the alleged First Amendment violation. *Moran v. State of Washington,* 147 F.3d 839, 844 (9th Cir.1998).

Defendants contend that Sheriff Sprungl is entitled to qualified immunity on Ennis' First Amendment claim. Ennis did not respond to the qualified immunity claims in Defendants' motion. Offering no evidence that specifically rebuts facts submitted by a defendant is not sufficient to defeat a motion for summary judgment. *Kardoh v. U.S.,* 572 F.3d 697, 702 (9th Cir.2009) (*see* Fed.R.Civ.P. 56(e)(2)). Also, when viewing the facts in a light most favorable to Ennis, no First Amendment violation can be found. Thus, Ennis has failed to meet the first prong of *Saucier.* Even if the Court finds a potential constitutional violation, Defendants allege that it would not be clear to a reasonable official that terminating Ennis was unlawful. Defendants have shown that Sprungl was compelled to terminate Ennis because Ennis failed to become POST certified.

While the timing of the termination is suspect, given § 19-5117(2), a reasonable officer would consider the act lawful. In fact, it would have been unlawful not to terminate Ennis. Additionally, Ennis has not met his burden of responding to Defendants' claims under the second prong of *Saucier.* Thus, the Court will grant Defendants' motion as to Sprungl's qualified immunity claim.

(2) Eleventh Amendment immunity: Defendants Dinning, Smith, Kirby, and Stevens

Defendants assert that Dan Dinning, Ron Smith, Walt Kirby, and Richard Stevens are immune from Ennis' claims under the Eleventh Amendment. The Eleventh Amendment bars suits in federal court "by private parties seeking to impose a liability which must be paid from public funds." *Edelman v. Jordan,* 415 U.S. 651, 663, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). State officials acting in their official capacity cannot be sued under § 1983. *Hafer v. Melo,* 502 U.S. 21, 25, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991). As a result, these suits "should be treated as suits against the state." *Kentucky v. Graham,* 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). Finally, liability under § 1983 arises only upon a showing of personal participation by each defendant. *Fayle v. Stapley,* 607 F.2d 858, 862 (9th Cir.1979).

Under the Eleventh Amendment, Dinning, Smith, Kirby, and Stevens are immune from suit for actions performed in their official capacities. Further, Ennis raises no allegations against these individuals in their personal capacities; the Complaint only asserts specific allegations against Sheriff Sprungl. The Court finds that Defendants Dinning, Smith, Kirby, and Stevens are immune under the Eleventh Amendment.

C. Municipal liability

A municipality may be held liable under § 1983 when execution of its policy or custom inflicts a constitutional injury. *Burke v. County of Alameda,* 586 F.3d 725, 734 (9th Cir.2009) (*citing Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). A municipality cannot be held liable on a *respondeat superior* theory. *Monell,* 436 U.S. at 691. Ennis has not shown how a policy or custom of Boundary County compelled Sprungl to terminate Ennis for exercising his First Amendment rights. On the contrary, state law gave Sprungl the authority to terminate Ennis because he lacked POST certification. Thus, the court will grant Defendants' motion for summary judgment with respect to Boundary County.

D. Plaintiff's Due Process Claims

*8 Ennis makes general allegations in his Complaint that Defendants violated his due process rights. Defendants adequately countered his claim, to which the Plaintiff did not respond.

The Fourteenth Amendment to the United States Constitution bars states from depriving any person of life, liberty, or property, without due process of law. *Nordyke v. King,* 563 F.3d 439, 449 (9th Cir.2009); U.S. Const. amend. XIV, § 1. A procedural due process claim has two distinct elements: (1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections." *Hufford v. McEnaney,* 249 F.3d 1142, 1150 (9th Cir.2001). "A protected property interest is present where an individual has a reason-able expectation of entitlement deriving from existing rules or understandings that stem from an independent source such

as state law." *Stiesberg v. California,* 80 F.3d 353, 356 (9th Cir.1996).

The Court assumes Ennis contends that he was illegally terminated from his job as a detention officer. However, his j ob was not a protected property interest under the Fourteenth Amendment. It is not reasonable for Ennis to expect entitlement to his job because Idaho law expressly conditions peace officer employment on meeting POST certification. Ennis has not provided any evidence too show he actually obtained certification. Therefore, he did not lose a protected property interest and his due process claim fails.

In addition to Fourteenth Amendment due process claims, Ennis asserts that the Defendants violated his Fourth and Fifth Amendment rights. Complaints must allege more than unadorned accusations. *Ashcroft v. Iqbal,* ---U.S. ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (*citing Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A complaint fails when it offers "labels and conclusions" or " 'naked assertions' devoid of 'further factual enhancement.' " *Twombly,* 550 U.S. at 555, 557. Resting on allegations without factual support makes summary judgment proper. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202.

Here, Ennis asserted blanket allegations regarding his Fourth and Fifth Amendment rights, and did not enhance them with any facts. Although the Defendants did not address these claims, the Court finds it appropriate to dismiss them here, for failure to state claims on which relief can be granted.

E. Department of Labor's decision not preclusive

In his Response, Ennis showed how the Idaho Department of Labor found Ennis' discharge was not motivated by misconduct on his part. (Ennis Aff., ¶ 3, Exh. A; *See* Idaho Code § 72-1366(e)). Defendants understand Ennis to assert that they are collaterally estopped from moving for summary judgment. In their Reply, Defendants assert that the Idaho Department of Labor findings are not preclusive in law nor in application. (Dkt. No. 17).

A state agency's determination of an issue is preclusive if it acts "in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *Astoria Federal Savings and Loan Ass'n v. Solimino,* 501 U.S. 104, 107, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991) (*quoting United States v. Utah Constr. & Mining Co.,* 384 U.S. 394, 422, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966)). The purpose of collateral estoppel is to enforce repose among litigants. *University of Tennessee v. Elliott,* 478 U.S. 788, 798, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986). However, the issue to be precluded must be identical in substance to the issue subsequently raised. *Astoria,* 501 U.S. at 108. Ennis has not shown how the Department of Labor resolved the facts in dispute in his First Amendment retaliation claim. Particularly, it is unclear how a finding of "no misconduct" resolves the issue of being terminated regardless of protected speech. Additionally, Defendants have shown that the determination of no misconduct does not defeat their motion for summary judgment.

***9** Idaho Code § 72-1366(e) defines the term "discharged for misconduct" as "willful, intentional disregard of the employer's interest; a deliberate violation of the employer's rules; or a disregard of standards of behavior which the employer has a right to expect of his employees." *Puckett v. Idaho Dep't of Corrections,* 107 Idaho 1022, 1023, 695 P.2d 407 (1985). Because the Department of Labor indicated that Ennis was terminated because he lacked POST certification yet found no misconduct, it seems both issues are not mutually exclusive. It was not Boundary County Sheriffs Office's 'rule,' 'standard of behavior,' or 'interest' that compelled Ennis' termination, but rather state law. Thus, Ennis has not overcome his burden to show that a genuine issue of material fact exists, particularly under the fifth prong of *Eng.* Accordingly,

IT IS ORDERED that Defendants' Motion for Summary Judgment (Docket No. 10) is **GRANTED.**

The Clerk of Court is directed to file this Order, provide copies to counsel and **CLOSE** this file.

Footnotes

1 *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) was a landmark Supreme Court case that established the law for First Amendment retaliation cases for § 1983 actions.

2 In support, Defendants seem to claim that IDAPA 11. 11.01.072 obligated Ennis, not Sprungl, to submit his application. However, the law does not mention anything about a duty specific to a person in Ennis' shoes.

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80 F.3d 954
United States Court of Appeals, Fourth Circuit.

Christine EVANS, Plaintiff-Appellant,
v.
TECHNOLOGIES APPLICATIONS & SERVICE COMPANY, Defendant-Appellee.

No. 95-1697. \| Argued Jan. 31, 1996. \| Decided April 5, 1996.

Female employee brought action against her employer for sex and age discrimination. The United States District Court for the District of Maryland, Alexander Williams, Jr., J., granted summary judgment for employer, and employee appealed. The Court of Appeals, Murnaghan, Circuit Judge, held that: (1) employee failed to satisfy her burden of proving that her employer refused to promote her because of her gender; (2) summary judgment could be granted without discovery; (3) district court did not abuse its discretion in striking portion of opposing party's affidavit before deciding summary judgment motion; and (4) employee's age discrimination, sexual harassment and pay and benefit discrimination claims did not relate back to her timely filed administrative complaint alleging only failure to promote.

Affirmed.

West Headnotes (22)

[1] **Federal Courts**
Trial De Novo

Court of Appeals reviews district court's grant of summary judgment de novo, applying same legal standards as district court and viewing facts and inferences drawn from facts in light most favorable to nonmoving party.

44 Cases that cite this headnote

[2] **Federal Civil Procedure**
Absence of Genuine Issue of Fact in General
Federal Civil Procedure
Right to Judgment as Matter of Law

Summary judgment is appropriate only when there is no genuine issue as to any material fact and moving party is entitled to judgment as matter of law. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

162 Cases that cite this headnote

[3] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

While courts must take special care when considering motion for summary judgment in discrimination case because motive is often critical issue, summary judgment disposition remains appropriate if plaintiff cannot prevail as matter of law.

60 Cases that cite this headnote

[4] **Civil Rights**
Sex Discrimination

Female employee failed to satisfy her burden of proving that her employer refused to promote her because of her gender, though she alleged differential treatment in pay, benefits and seniority, where she did not provide supporting proof for allegations, and alleged statement by her supervisor, who hired her initially, that he would not allow her to become supervisor was not discriminatory on its face.

18 Cases that cite this headnote

[5] **Civil Rights**
Effect of Prima Facie Case; Shifting Burden

Under three-step framework for proving employment discrimination, without direct evidence of discrimination, under *McDonnell Douglas*, plaintiff-employee must first prove

prima facie case of discrimination by preponderance of evidence; defendant-employer would then have opportunity to present legitimate, nondiscriminatory reason for its employment action; if employer does so, presumption of unlawful discrimination created by prima facie case "drops out of the picture" and burden shifts back to employee to show that given reason was just pretext for discrimination.

214 Cases that cite this headnote

[6] **Civil Rights**
Presumptions, Inferences, and Burden of Proof

Plaintiff employee claiming discrimination always bears ultimate burden of proving that employer intentionally discriminated against her.

49 Cases that cite this headnote

[7] **Civil Rights**
Particular Cases

Female employee failed to satisfy her obligation to prove that her employer intentionally discriminated against her by failing to promote her, though she was qualified for promotion, where management did not consider her ready for supervisory position, and consolidated supervisory position was assigned to person they considered best qualified to assume those tasks based on his computer and prior supervisory experience; employee's bald assertions concerning her own qualifications and shortcomings of her co-workers failed to disprove employer's explanation or show discrimination.

119 Cases that cite this headnote

[8] **Civil Rights**
Promotion, Demotion, and Transfer

In failure to promote case, plaintiff must establish that she was better qualified candidate for position sought as proof that company's explanation is pretextual and that she was victim of intentional discrimination.

114 Cases that cite this headnote

[9] **Federal Civil Procedure**
Time for Consideration of Motion

As general rule, summary judgment is appropriate only after adequate time for discovery.

37 Cases that cite this headnote

[10] **Federal Civil Procedure**
Time for Consideration of Motion

Summary judgment must be refused where opposing party has not had opportunity to discover essential information.

12 Cases that cite this headnote

[11] **Federal Civil Procedure**
Time for Consideration of Motion

Summary judgment was properly granted without discovery, though opposing party's memorandum referred to her lack of discovery, where she did not file any discovery requests, move for continuance to conduct discovery, or file affidavit. Fed.Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.

17 Cases that cite this headnote

[12] **Federal Civil Procedure**
Time for Consideration of Motion

Nonmoving party cannot complain that summary judgment was granted without discovery unless that party attempted to oppose motion on grounds

that more time was needed for discovery or moved for continuance to permit discovery before district court ruled.

48 Cases that cite this headnote

[13] **Federal Civil Procedure**
Time for Consideration of Motion

Summary judgment may be denied or continuance ordered if nonmovant shows through affidavits that it could not properly oppose motion for summary judgment without chance to conduct discovery. Fed.Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.

19 Cases that cite this headnote

[14] **Federal Civil Procedure**
Time for Consideration of Motion

Party may not simply assert in its brief that discovery was necessary and thereby overturn summary judgment when it failed to comply with requirement that it set out reasons for need for discovery in affidavit. Fed.Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.

34 Cases that cite this headnote

[15] **Federal Civil Procedure**
Time for Consideration of Motion

While courts generally are concerned about granting summary judgment when opposing party has not had fair opportunity to discover essential information, they reasonably expect notification and explanation when more time for discovery is needed. Fed.Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.

14 Cases that cite this headnote

[16] **Federal Civil Procedure**
Affidavits

District court did not abuse its discretion in striking portion of opposing party's affidavit before deciding summary judgment motion, where those portions consisted of party's own self-serving opinions without objective corroboration, and other statements that were found to be hearsay, irrelevant or conclusory. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

139 Cases that cite this headnote

[17] **Federal Civil Procedure**
Form and Requisites

Generally, affidavit filed in opposition to motion for summary judgment must present evidence in substantially same form as if affiant were testifying in court. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

27 Cases that cite this headnote

[18] **Federal Civil Procedure**
Form and Requisites

Affidavits submitted on summary judgment must contain admissible evidence and be based on personal knowledge. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

43 Cases that cite this headnote

[19] **Civil Rights**
Operation; Accrual and Computation

Female employee's age discrimination, sexual harassment and pay and benefit discrimination claims did not relate back to her timely filed administrative complaint, and were thus time barred, where only allegation made in her original administrative charge was that employer failed to promote her because of her sex. Civil Rights Act of 1964, § 706(e)(1), 42 U.S.C.A. §

2000e-5(e)(1); Md.Code 1957, Art. 33, § 27-7.

79 Cases that cite this headnote

[20] **Civil Rights**
Effect; Excuses in General
Civil Rights
Admissibility of Evidence; Statistical Evidence

Discrimination charges filed outside time frame for administrative charges of discrimination are barred, but discriminatory allegation may still be relevant background evidence for valid claims.

5 Cases that cite this headnote

[21] **Civil Rights**
Scope of Administrative Proceedings; Like or Related Claims

Allegations contained in administrative charge of discrimination generally operate to limit scope of any subsequent judicial complaint.

55 Cases that cite this headnote

[22] **Civil Rights**
Scope of Administrative Proceedings; Like or Related Claims

Only discrimination claims stated in initial charge, reasonably related to original complaint, and developed by reasonable investigation of original complaint may be maintained in subsequent Title VII lawsuit. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
241 Cases that cite this headnote

***956** Appeal from the United States District Court for the District of Maryland, at Greenbelt. Alexander Williams, Jr., District Judge. (CA-94-1767-AW).

Attorneys and Law Firms

ARGUED: Mindy Gae Farber, Jacobs, Jacobs & Farber, Rockville, Maryland, for ***957** Appellant. Ronald Wayne Taylor, Venable, Baetjer & Howard, L.L.P., Baltimore, Maryland, for Appellee. **ON BRIEF:** Patricia Gillis Cousins, Venable, Baetjer & Howard, L.L.P., Baltimore, Maryland, for Appellee.

Before HALL and MURNAGHAN, Circuit Judges, and STAMP, Chief United States District Judge for the Northern District of West Virginia, sitting by designation.

Opinion

Affirmed by published opinion. Judge MURNAGHAN wrote the opinion, in which Judge HALL and Chief Judge STAMP joined.

OPINION

MURNAGHAN, Circuit Judge:

Appellant Christine Evans appeals a district court order granting summary judgment to her employer in a Title VII discrimination case. She argues that the district court erred by failing to apply the appropriate legal standards in analyzing the motion for summary judgment, by striking much of her affidavit and by barring several of her discrimination claims as not proceeding from or relating to her original charge of failure to promote because of sex discrimination. We find her challenges meritless.

I. *BACKGROUND*

Evans was a temporary worker assigned to the Norden Service Company, Inc., when Technologies Applications and Services Company, Inc. ("TAS"), purchased it in April 1991.1 Two months later, Gary Houseman, TAS's Director of Quality Assurance, recommended that TAS hire Evans full-time as an Inspector/Quality Control Analyst in his department.2 Upon assuming the position in June 1991, Evans was assigned to inspect TAS computer hardware products, such as consoles for naval ship combat centers at various stages of production. As early as December 1991, Evans informed company officials that she was interested in obtaining a supervisory position.

Overall, Evans received good evaluations at TAS. Houseman described her as an excellent employee in a September 1992 performance review, but also indicated that her attitude and "moodiness" would affect her promotability. In addition, Evans and another quality control inspector, Winston Samuel, both received reprimands in February 1993 for squabbling on the job.

Several personnel changes took place at TAS, some of which were related to financial difficulties at the company. In February 1992, the Quality Control Supervisor ("QCS") resigned. TAS officials selected James Thompson, a supervisor and long-time Field Service Engineer, to assume the QCS duties and work in a dual capacity as QCS/Field Engineer. Neither Evans nor Samuel was given an opportunity to apply for the supervisory position. A year later, Thompson resigned as QCS. TAS officers never advertised the QCS job as open, but instead eliminated the position and assigned its duties to Ronald Lewis, a man already performing software engineering functions. Again, neither Evans nor Samuel had a chance to apply for the reconfigured position.

On April 21, 1993, Evans filed a discrimination charge with the Montgomery County, Maryland, Human Relations Commission ("HRC"). In the charge, Evans alleged that TAS denied her a promotion because of her gender. She asserted that Houseman's February 1993 decision to eliminate the QCS position and merge its duties into the software engineering position held by Lewis constituted sex discrimination. On April 4, 1994, Evans amended her charge to allege that the February 1993 decision amounted to age discrimination as well.

The following month, Evans filed suit in the Circuit Court of Montgomery County, Maryland, claiming that TAS had discriminated against her because of her sex and age in violation of local laws and Title VII of the Civil Rights Act of 1964, ***958** 42 U.S.C. § 2000e *et seq.* Evans made numerous allegations: that another employee harassed her in 1990; that she was "ripe" but not selected for promotion in 1991;3 that she received different pay, benefits, and seniority than younger males; that TAS failed to promote her in 1993 because of her age and her gender; and that TAS failed to take adequate affirmative steps to correct its unlawful practices.

After removal to the United States District Court, TAS moved for dismissal or summary judgment, arguing that all of Evans's claims-except for the sex discrimination allegation-should be dismissed because they were never raised in a timely administrative charge. TAS also maintained that Evans failed to make out a *prima facie* case to support her claim of sex-based failure to promote and ultimately failed to establish that she was the victim of sex discrimination. In support of its position, TAS submitted an affidavit from Evans's immediate supervisor, Houseman, and other exhibits.

Evans opposed TAS's motion and submitted her own affidavit attesting to her qualifications for the QCS position. Although the memorandum of law in support of her motion indicated that she had not had the opportunity to conduct discovery, Evans had never requested discovery nor sought a continuance to enable her to gather information to refute TAS's motion.

The district judge issued a memorandum and order in February 1995, granting TAS's motion for summary judgment. The judge examined Evans's affidavit and struck portions of it as "not based on personal knowledge," "containing hearsay statements," or "irrelevant, conclusory, or both." He dismissed Evans's claims of sexual harassment, failure to promote in 1991, and discrimination in pay and benefits as outside the scope of Evans's administrative charge and not "reasonably proceeding from a sex discrimination claim based on failure to promote." The judge also dismissed Evans's age discrimination claim as untimely, finding that the allegation was belated and unrelated to her original administrative charge of sex discrimination. He noted that "Evans never mentioned her age or indicated in any manner that age was a factor" in the original charge. Finally, the district judge found that Evans had not established a *prima facie* case of failure to promote in 1993 because of sex discrimination nor provided any evidence that TAS's articulated reasons for assigning the QCS duties elsewhere were pretextual or "unworthy of credence." Determining that no issue of material fact existed for a jury to resolve, the district judge granted summary judgment to TAS. Evans filed a timely notice of appeal.

II. *CLAIM OF SEX DISCRIMINATION BY FAILURE TO PROMOTE*

Evans rests on two grounds her contention that the district court erred in granting TAS's motion for summary judgment on her claim that she was denied promotion because of her sex: that the court failed to apply the appropriate legal standards and that she had not received adequate opportunity to conduct discovery. We consider each in turn.

A. *Summary Judgment Analysis*

[1] [2] [3] We review the district court's grant of summary

judgment *de novo,* applying the same legal standards as the district court and viewing the facts and inferences drawn from the facts in the light most favorable to Evans, the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Nguyen v. CNA Corp.,* 44 F.3d 234, 236-37 (4th Cir.1995). Summary judgment is appropriate only when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986). While courts must take special care when considering a motion for summary judgment in a discrimination case because motive is often the critical issue, summary judgment disposition remains appropriate if the plaintiff ***959** cannot prevail as a matter of law. *Ballinger v. North Carolina Agric. Extension Serv.,* 815 F.2d 1001, 1005 (4th Cir.), *cert. denied,* 484 U.S. 897, 108 S.Ct. 232, 98 L.Ed.2d 191 (1987). If, after reviewing the record as a whole, however, we find that a reasonable jury could return a verdict for Evans, then a genuine factual dispute exists and summary judgment is improper. *Anderson,* 477 U.S. at 248, 106 S.Ct. at 2510.

[4] Evans's charge that TAS refused to promote her because of her gender is a claim of disparate treatment. To meet her burden on summary judgment, Evans might have offered direct or circumstantial evidence, or proceeded under the proof scheme set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). *Mitchell v. Data General Corp.,* 12 F.3d 1310, 1314 (4th Cir.1993); *EEOC v. Clay Printing Co.,* 955 F.2d 936, 940 (4th Cir.1992). Our analysis reveals that Evans failed to meet her various burdens under either approach. In reaching the same conclusion, the district court set forth the appropriate governing standards then analyzed the evidence before it, primarily using the burden-shifting scheme established by *McDonnell Douglas* and its progeny.

To satisfy ordinary principles of proof, Evans must provide direct evidence of a purpose to discriminate or circumstantial evidence of sufficiently probative force to raise a genuine issue of material fact. *Goldberg v. B. Green & Co.,* 836 F.2d 845, 848 (4th Cir.1988). The record reveals little, if any, direct or indirect evidence of discriminatory motive. Evans alleges differential treatment in pay, benefits and seniority but fails to provide supporting proof. She also alleges, without offering corroborating evidence, that she was discriminated against in previous promotion decisions. Evans offers an alleged comment by Houseman that he would not allow her to become a supervisor. However, the statement is not discriminatory on its face, as it could have been made in reference to any male or female employee seeking promotion. Nor is it placed in any context that makes it so. In addition, because Houseman is the same person who hired Evans, there is a "powerful inference" that the failure to promote her was not motivated by discriminatory animus. *Proud v. Stone,* 945 F.2d 796, 798 (4th Cir.1991); *see also Mitchell,* 12 F.3d at 1318. Evans also submitted her own affidavit, mostly made up of conclusory statements about her qualifications and the deficiencies of her colleagues. However, Evans's "own naked opinion, without more, is not enough to establish a *prima facie* case of [ ]discrimination." *Goldberg,* 836 F.2d at 848. For Evans to prevail, then, it must be by using the proof scheme established in *McDonnell Douglas.*

[5] [6] [7] Under that three-step framework, the plaintiff-employee must first prove a *prima facie* case of discrimination by a preponderance of the evidence. If she succeeds, the defendant-employer has an opportunity to present a legitimate, non-discriminatory reason for its employment action. If the employer does so, the presumption of unlawful discrimination created by the *prima facie* case "drops out of the picture" and the burden shifts back to the employee to show that the given reason was just a pretext for discrimination. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 511, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993); *Ennis v. National Ass'n of Bus. & Educ. Radio,* 53 F.3d 55, 57-58 (4th Cir.1995). The plaintiff always bears the ultimate burden of proving that the employer intentionally discriminated against her. *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981); *Hughes v. Bedsole,* 48 F.3d 1376, 1384 (4th Cir.), *cert. denied,* 516 U.S. 870, 116 S.Ct. 190, 133 L.Ed.2d 126 (1995). Based on the record before us, Evans has failed to satisfy her obligation.

To establish a *prima facie* case of disparate treatment, Evans must prove a set of facts enabling the court to conclude that it is more likely than not that TAS's failure to promote her was motivated by discrimination. *Ennis,* 53 F.3d at 58. She must show by a preponderance of the evidence that (1) she is a member of a protected class; (2) her employer had an open position for which she applied or sought to apply; (3) she was qualified for the position; and (4) she was rejected for the position under circumstances ***960** giving rise to an inference of unlawful discrimination. *Burdine,* 450 U.S. at 253, 101 S.Ct. at 1093-94; *Carter v. Ball,* 33 F.3d 450, 458 (4th Cir.1994); *McNairn v. Sullivan,* 929 F.2d 974, 977 (4th Cir.1991). While the evidence creates a close call as to Evans's qualification for the QCS position, we must remember that "the burden of establishing a *prima facie* case of disparate treatment is not onerous." *Burdine,* 450 U.S. at 253, 101 S.Ct. at 1094. Thus, for purposes of this appeal, we find that Evans has satisfied the "relatively easy test" of

showing that she, a qualified applicant, "was rejected under circumstances which give rise to an inference of unlawful discrimination." *Young v. Lehman,* 748 F.2d 194, 197 (4th Cir.) (internal quotations and citations omitted), *cert. denied,* 471 U.S. 1061, 105 S.Ct. 2126, 85 L.Ed.2d 489 (1985).

Our inquiry is not over, however, for TAS has articulated legitimate, non-discriminatory reasons for choosing a man to fill the QCS position instead of Evans. The company offered substantial evidence that management considered Evans not yet ready for a supervisory position, including the September 1992 performance review indicating that while she was good at her job, Evans had problems with "moodiness," Evans's February 1993 reprimands, and Houseman's statements that Evans lacked the education and training needed for the QCS position. In addition, TAS provided proof that company officials decided for financial reasons to eliminate the QCS position by merging it into another position, and then did so by assigning the QCS duties to Lewis, the person they considered best qualified to assume the QCS tasks. Unlike Evans and Samuel, Lewis was well-versed in computer hardware and software and possessed prior supervisory experience. He also had seniority in the company, having joined it in 1982.

[8] Job performance and relative employee qualifications are widely recognized as valid, non-discriminatory bases for any adverse employment decision. *See Burdine,* 450 U.S. at 258-59, 101 S.Ct. at 1096-97; *Young,* 748 F.2d at 198. Because "the employer has discretion to choose among equally qualified candidates provided the decision is not based upon unlawful criteria," *Wileman v. Frank,* 979 F.2d 30, 38 (4th Cir.1992) (citing *Burdine,* 450 U.S. at 259, 101 S.Ct. at 1096-97), Evans must present proof that the company's explanation is pretextual and that she was the victim of intentional discrimination. *Hughes,* 48 F.3d at 1384; *Wileman,* 979 F.2d at 33. In a failure to promote case, the plaintiff must establish that she was the better qualified candidate for the position sought. *Gairola v. Virginia Dep't of Gen. Servs.,* 753 F.2d 1281, 1287 (4th Cir.1985); *Young,* 748 F.2d at 198.

Evans's evidence falls far short of that needed to overcome summary judgment. She has failed to show that she was more qualified for the promotion than the man selected or that, as between her sex and TAS's explanation, her sex was the more likely reason for her failure to be promoted. While a Title VII plaintiff may present direct or indirect evidence to support her claim of discrimination, unsupported speculation is insufficient. *Felty v. Graves-Humphreys Co.,* 818 F.2d 1126, 1128 (4th Cir.1987); *Ballinger,* 815 F.2d at 1005. Evans's unsubstantiated allegations and bald assertions concerning her own qualifications and the shortcomings of her co-workers fail to disprove TAS's explanation or show discrimination. *See Goldberg,* 836 F.2d at 848 (plaintiff's own opinions and conclusory allegations do not have sufficient "probative force to reflect a genuine issue of material fact"); *Lovelace v. Sherwin-Williams Co.,* 681 F.2d 230, 245 (4th Cir.1982); *Smith v. Flax,* 618 F.2d 1062, 1067 (4th Cir.1980); *Douglas v. PHH FleetAmerica Corp.,* 832 F.Supp. 1002, 1010 (D.Md.1993). The evidence shows that Evans was treated like the only other similarly situated individual at TAS-Samuel also held the position of inspector and was denied the opportunity to apply for the QCS opening-and that her supervisor thought she did not merit a promotion. The demonstrated facts remain therefore that TAS management found Lewis to be the most qualified employee and shifted to him the QCS responsibilities. Evans simply has failed to demonstrate that she was more qualified than that employee and thus more deserving of the duties. "It is the perception of the decision maker ***961** which is relevant," not the self-assessment of the plaintiff. *Smith,* 618 F.2d at 1067. Based on our review of the record, then, we find that Evans has failed to demonstrate a genuine issue for trial.

B. *Summary Judgment Without Discovery*

[9] [10] [11] As a general rule, summary judgment is appropriate only after "adequate time for discovery." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Temkin v. Frederick County Comm'rs,* 945 F.2d 716, 719 (4th Cir.1991), *cert. denied,* 502 U.S. 1095, 112 S.Ct. 1172, 117 L.Ed.2d 417 (1992). "[S]ummary judgment must be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson,* 477 U.S. at 250 n. 5, 106 S.Ct. at 2511 n. 5. Evans first argues not only that the principle is a hard and fast rule, but also that her lack of discovery placed extra burdens on TAS to prove that there was no issue for trial. However, she has provided no legal support for her contentions.

[12] [13] [14] We have held that the nonmoving party cannot complain that summary judgment was granted without discovery unless that party had made an attempt to oppose the motion on the grounds that more time was needed for discovery or moved for a continuance to permit discovery before the district court ruled. *See Nguyen,* 44 F.3d at 242. Federal Rule of Civil Procedure 56(f) permits a court to deny summary judgment or to order a continuance if the nonmovant shows through affidavits that it could not properly oppose a motion for summary judgment without a chance to conduct discovery. We, like other reviewing courts, place great weight on the Rule 56(f) affidavit, believing that "[a] party may not simply assert in its brief that discovery was necessary and thereby

overturn summary judgment when it failed to comply with the requirement of Rule 56(f) to set out reasons for the need for discovery in an affidavit." *Nguyen,* 44 F.3d at 242 (citing *Hayes v. North State Law Enforcement Officers Ass'n,* 10 F.3d 207, 215 (4th Cir.1993)); *see also Rohrbough v. Wyeth Labs., Inc.,* 916 F.2d 970, 972 n. 3 (4th Cir.1990) (if plaintiffs arguing that summary judgment was premature because they had inadequate time for discovery were "genuinely concerned," then they should have sought relief under Rule 56(f)). The Second Circuit Court of Appeals has similarly explained that "[a] reference to Rule 56(f) and to the need for additional discovery in a memorandum of law in opposition to a motion for summary judgment is not an adequate substitute for a Rule 56(f) affidavit ... and the failure to file an affidavit under Rule 56(f) is itself sufficient grounds to reject a claim that the opportunity for discovery was inadequate." *Paddington Partners v. Bouchard,* 34 F.3d 1132, 1137 (2d Cir.1994) (internal citations omitted).

The record shows that Evans never filed any discovery requests, moved for a continuance so she could conduct discovery, or filed an affidavit as required by Rule 56(f). In short, Evans never informed the district court that she needed time to develop the factual record so that she could properly oppose TAS's motion. Evans concedes that she did not file an affidavit in accordance with Rule 56(f) but argues that she made her discovery concerns known in her memorandum in opposition to TAS's summary judgment motion by noting her lack of discovery in two passages.[4] While Evans's memorandum refers to her lack of discovery, the effort is insufficient to compel denial of TAS's summary judgment motion.

[15] While courts generally are concerned about granting summary judgment when the opposing party has not had a fair opportunity to discover essential information, they reasonably expect notification and explanation when more time for discovery is needed. In light of Evans's failure to take any affirmative steps regarding discovery, we ***962** do not find the district court's grant of summary judgment to TAS improper.

III. *EVANS'S AFFIDAVIT*

[16] Evans next charges that the district court improperly struck much of the affidavit she submitted in support of her opposition to TAS's motion for summary judgment. We review the trial court's decision for abuse of discretion, *United States v. Hassan El,* 5 F.3d 726, 731 (4th Cir.1993), *cert. denied,* 511 U.S. 1006, 114 S.Ct. 1374, 128 L.Ed.2d 50 (1994), and the factual determinations underlying the evidentiary ruling for clear error, *Anderson v. Bessemer City,* 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985).

[17] [18] Generally, an affidavit filed in opposition to a motion for summary judgment must present evidence in substantially the same form as if the affiant were testifying in court. Federal Rule of Civil Procedure 56(e) specifically requires that affidavits submitted on summary judgment contain admissible evidence and be based on personal knowledge. *See also Williams v. Griffin,* 952 F.2d 820, 823 (4th Cir.1991) (evidence submitted in opposition to summary judgment motion must be admissible and based on personal knowledge). Thus, summary judgment affidavits cannot be conclusory, *Rohrbough,* 916 F.2d at 975, or based upon hearsay, *Maryland Highways Contractors Ass'n v. Maryland,* 933 F.2d 1246, 1252 (4th Cir.), *cert. denied,* 502 U.S. 939, 112 S.Ct. 373, 116 L.Ed.2d 325 (1991).

Because the district court followed such principles when it struck many portions of Evans's affidavit, it acted properly. The district judge did not strike the entire affidavit and did not grant all of TAS's requests to strike, but instead struck and disregarded only those portions it deemed inadmissible or improper in accordance with Rule 56(e). Furthermore, the district judge carefully specified which parts of the affidavit would be stricken and why. Several of the portions struck consisted of Evans's own unsupported assertions of her qualifications and the abilities of her colleagues.[5] Because, again, we generally consider self-serving opinions without objective corroboration not significantly probative, the decision to strike and disregard as irrelevant Evans's assertions was not improper. The district court's determination that portions of the affidavit contained statements that were not based on personal knowledge does not appear to be clearly erroneous.[6] Finally, the court correctly found other statements to be hearsay, irrelevant, or conclusory, and properly struck those sections pursuant to Rule 56(e).

IV. *CLAIMS OF SEXUAL HARASSMENT, PAY AND BENEFITS DISCRIMINATION AND AGE DISCRIMINATION*

[19] Finally, Evans challenges the district court's dismissal of her other claims as time-barred and outside the scope of the original charge filed with the Montgomery County HRC. She maintains that those claims should have been permitted as amended to or relating back to her original charge.

[20] [21] [22] Title VII and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.,*

provide a maximum of 300 days from the occurrence of an alleged discriminatory event for a claimant to file a timely charge with the EEOC, if she first instituted proceedings with a state or local agency, 42 U.S.C. § 2000e-5(e)(1); 26 U.S.C. § 26(d)(2), while Montgomery County law allows one year, Mont. Co., Md., Code § 27-7. Charges filed outside that time frame are barred, but a discriminatory allegation may still constitute relevant background evidence for valid claims. *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977). The allegations contained in the administrative charge of discrimination generally operate to limit the ***963** scope of any subsequent judicial complaint. *King v. Seaboard Coast Line R.R.*, 538 F.2d 581, 583 (4th Cir.1976). Only those discrimination claims stated in the initial charge, those reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint may be maintained in a subsequent Title VII lawsuit. *King*, 538 F.2d at 583; *see also Lawson v. Burlington Indus.*, 683 F.2d 862, 863-64 (4th Cir.) (affirming lower court's determination of untimeliness because charge of illegal layoff does not encompass allegations of illegal failure to rehire), *cert. denied*, 459 U.S. 944, 103 S.Ct. 257, 74 L.Ed.2d 201 (1982); *Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333, 337 (7th Cir.1993) (finding job transfer and salary claims not contained in EEOC charge barred).

The only allegation that Evans made in her original administrative charge was that TAS failed to promote her in February 1993 because of her sex. Evans never filed a charge with the EEOC or the Montgomery County HRC alleging sexual harassment or discrimination in pay and benefits. Furthermore, the harassment claim alleges conduct that occurred in 1990-well beyond the scope of the applicable laws. *See* 42 U.S.C. § 2000e-5(e)(1); Mont. Co., Md., Code § 27-7. The district court properly determined therefore that Evans's additional claims were time-barred.

Evans also contends, however, that she brought those additional allegations in order to show illegal motive and a pattern of discrimination because "all of the discriminatory events and incidents surrounding Evans's employment are closely interrelated with TAS's discrimination and unwillingness to promote her." Even so, the district court ruled properly, recognizing that while the later allegations cannot stand as separate charges of discrimination for which TAS may be liable, they might be admissible as evidence at trial to support her properly asserted sex discrimination claim. *See United Air Lines*, 431 U.S. at 558, 97 S.Ct. at 1889.

Again, Evans's original charge alleged only sex discrimination. It never mentioned age or alleged that age was a factor in TAS's alleged discriminatory denial of promotion. Evans added the age discrimination accusation after the charge had been pending for nearly a year, and more than a full year after the alleged discriminatory activity took place. Thus, on its face, the age discrimination claim is time-barred, having been filed well after both the ADEA and the county time limit had expired. *See* 29 U.S.C. 626(d); Mont. Co., Md., Code § 27-7. Evans maintains, however, that the age discrimination claim arose from the same facts and circumstances as her sex discrimination charge and thus relates back to the original filing date. EEOC regulations provide that when an amendment is filed outside the applicable limitations period, it may be considered timely if it involves claims "related to or growing out of" the original charge. 29 C.F.R. § 1626.8(c). However, age discrimination does not necessarily flow from sex discrimination and vice versa. *See, e.g., Conroy v. Boston Edison Co.*, 758 F.Supp. 54, 59 (D.Mass.1991) (untimely amendment alleging age discrimination does not relate back to original sex discrimination charge since not flowing from it); *Rizzo v. WGN Continental Broadcasting Co.*, 601 F.Supp. 132, 134-35 (N.D.Ill.1985) (untimely amended claim of sex discrimination does not relate back to the original charge of age discrimination because the allegations could not be inferred from it). Moreover, Title VII and ADEA claims arise from completely distinct statutory schemes. *See Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 675 (9th Cir.1988) (denying amendment adding age discrimination allegation to charge of discrimination based on national origin). Other courts have observed that permitting a late amendment to an original discrimination charge adding an entirely new theory of recovery "would eviscerate the administrative charge filing requirement altogether" by depriving the employer of adequate notice and resulting in a failure to investigate by the responsible agency. *Conroy*, 758 F.Supp. at 59-60. Such was the outcome here: Evans filed her lawsuit only one month after she filed her amendment, depriving the HRC of time to investigate the age discrimination allegation and TAS of notice of the claim.

***964** For these reasons, we find that the district court properly dismissed Evans's claims of sexual harassment, pay and benefit discrimination, and age discrimination as time-barred or outside the scope of her administrative charge. Because we conclude that the district court properly granted summary judgment to TAS, its order is

AFFIRMED.

Parallel Citations

72 Fair Empl.Prac.Cas. (BNA) 1222, 68 Empl. Prac. Dec. P 44,010, 34 Fed.R.Serv.3d 1033

Footnotes

1 TAS is a government contractor that builds and supplies high technology equipment for the United States Government.

2 Both Houseman and Evans were 42 years old at the time.

3 Evans's complaint alleges promotion discrimination in 1991, but the relevant QCS position was vacated and filled by Thompson in 1992.

4 Evans's memorandum in opposition states that TAS's assertions that she could not prove the *McDonnell Douglas* elements are without merit and inappropriate for argument "at this early stage in the litigation-especially when plaintiff has not yet been afforded the opportunity to conduct discovery," and that "[e]ven without the aid of discovery," she could make a *prima facie* case of sex discrimination.

5 In those sections, Evans details her own qualifications, disparages the qualifications and work experiences of two of her colleagues, and discusses the qualifications of her supervisor.

6 The district court determined that Evans, a low-level employee, would not have had information about TAS's financial affairs or the criteria for a position that was never posted, and consequently struck her statements about those matters.

End of Document

When there are two permissible views of evidence, district court's choice of one view cannot be clearly erroneous.

2 Cases that cite this headnote

[6] **Civil Rights**
Questions of law or fact
Federal Courts
Civil rights cases

In Title VII discrimination case, district court's resolution of ultimate issue whether employer's reason for denying promotion to employee was pretext is finding of fact subject to clearly erroneous standard. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17; Fed.Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

7 Cases that cite this headnote

[7] **Civil Rights**
Particular cases

Female attorney failed to show that law firm's failure to admit her as partner violated Title VII, as record did not show that firm applied its partnership admission standards unequally to male and female associates, nor that diminished ability in area of legal analysis was improper reason for denying admission; district court's belief that firm's high standard of analytical ability was unwise did not make firm's standard a pretext for discrimination, district court's comparison of plaintiff with successful male candidates in categories other than legal analytic ability did not lend support to its ultimate finding of pretext, and district court ignored evidence firm produced to compare plaintiff's shortcomings with strengths of successful male candidates in category of legal analytic ability. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17; Fed.Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

20 Cases that cite this headnote

[8] **Civil Rights**
Motive or intent; pretext

Pretext in Title VII action is not established by virtue of fact that employee has received some favorable comments in some categories or has, in past, received some good evaluations. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

38 Cases that cite this headnote

[9] **Civil Rights**
Motive or intent; pretext

Title VII plaintiff does not establish pretext by pointing to criticisms of members of nonprotected class, or commendation of plaintiff, in categories defendant says it did not rely upon in denying promotion to member of protected class, although such comments may raise doubts about fairness of employer's decision. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

44 Cases that cite this headnote

[10] **Civil Rights**
Motive or intent; pretext

In Title VII discrimination case, evidence establishing incredibility of employer's reason must show that standard or criterion employer relied on was obviously weak or implausible. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

136 Cases that cite this headnote

[11] **Civil Rights**
Admissibility of evidence; statistical evidence

In Title VII discrimination case, court should not ignore evidence which sheds light on whether

employer treated similarly situated males and females alike. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

4 Cases that cite this headnote

[12] **Civil Rights**
Particular cases

Even if female attorney received "small" cases at beginning of her tenure at law firm, no violation of Title VII was shown, as there was no evidence that such assignments were result of sex discrimination; her evaluations indicated that it may have been her academic credentials that contributed to her receipt of less complex assignments. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

[13] **Civil Rights**
Admissibility of evidence; statistical evidence

Statistical evidence of employer's pattern and practice with respect to minority employment may be relevant to showing of pretext in TItle VII case. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

8 Cases that cite this headnote

[14] **Civil Rights**
Sex discrimination

Female attorney's raw numerical comparisons of small number of women admitted to partnership throughout law firm's history were not probative of firm's alleged discriminatory motive in failing to admit her to partnership; her comparisons were not accompanied by any analysis of either qualified applicant pool or flow of qualified candidates over relevant time period. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

28 Cases that cite this headnote

[15] **Civil Rights**
Motive or intent; pretext

District court's findings that female attorney was evaluated negatively for being too involved with women's issues, specifically her concern about law firm's treatment of paralegals, and that male partner was not criticized for encouraging discussion of "women's issue" of part-time employment, were of marginal value in supporting finding that firm's failure to admit female attorney to partnership was for pretextual reason in violation of Title VII; partner testified that he was not criticizing plaintiff for raising paralegal issue, but for her misperception that it was "women's issue." Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

2 Cases that cite this headnote

[16] **Civil Rights**
Particular cases

Record did not support district court's finding, in Title VII action against law firm by female attorney who was not admitted to partnership, that male associate's sexual harassment of female employees at firm was not mentioned in its consideration of that male associate for partnership; chairman of associates committee met with male associate concerning those incidents and placed memorandum in his personnel file, and incident occurred after associates committee decided it was unlikely to recommend him for partnership in any event. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

1 Cases that cite this headnote

[17] **Civil Rights**

Disparate treatment

District court's finding in Title VII discrimination case that female attorney who was not made partner was evaluated negatively for being "very demanding," while several male associates who were made partners were evaluated negatively for lacking sufficient assertiveness in their demeanor, did not support court's conclusion that female attorney was treated differently because of her gender; criticisms of her assertiveness related to way in which she handled administrative manners such as office and secretarial space, while criticism of male associates for lacking assertiveness was related to their handling of legal matters. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

5 Cases that cite this headnote

[18] **Civil Rights**
Particular cases

Law firm partner's alleged statement to female attorney during selection process that she did not fit firm's mold since she was a woman did not support district court's conclusion that firm's subsequent failure to admit female attorney to partnership violated Title VII; other evidence of sex discrimination was lacking, partner made that comment five years before partnership decision, and partner himself left firm before partnership decision was made, although he had consistently supported female attorney's candidacy. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

29 Cases that cite this headnote

[19] **Civil Rights**
Motive or intent; pretext

Law firm partner's six alleged crude and unprofessional statements to female attorney over period of five years were insufficient to sustain district court's finding that law firm's reason for denying female attorney admission to partnership, i.e., her legal analytical ability, was just pretext to cover up sex discrimination; other evidence of sex discrimination was lacking and, although partner was at one time decision maker and eventually supported female attorney's admission to partnership, he took no part in final votes or evaluations concerning her because he had by that time left firm. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

29 Cases that cite this headnote

Attorneys and Law Firms

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Present: HUTCHINSON, COWEN and SEITZ, Circuit Judges.

Opinion

OPINION OF THE COURT

HUTCHINSON, Circuit Judge.

Wolf, Block, Schorr and Solis-Cohen (Wolf) appeals from a judgment of the United States District Court for the Eastern District of Pennsylvania granting relief in favor of Nancy O'Mara Ezold (Ezold) on her claim that Wolf intentionally discriminated against her on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1981 & Supp.1992), when it decided not to admit her to the firm's partnership effective February 1, 1989. At trial Wolf contended that it denied Ezold admission to the partnership because her skills in the category of legal analysis did not meet the firm's standards. The district court disagreed and found that this articulated reason was a pretext contrived to mask sex discrimination. Wolf argues on appeal that the district court improperly analyzed the evidence before it and that the evidence, properly analyzed, does not support the district court's ultimate finding of pretext.

This case raises important issues that cut across the spectrum of discrimination law. It is also the first in which allegations of discrimination arising from a law firm partnership admission decision require appellate review after trial.[1] Accordingly, we have given it our closest attention and, after an exhaustive examination of the record and analysis of the applicable law, have concluded that the district court made two related errors whose combined effect require us to reverse the judgment in favor of Ezold. The district court first impermissibly ***513** substituted its own subjective judgment for that of Wolf in determining that Ezold met the firm's partnership standards. Then, with its view improperly influenced by its own judgment of what Wolf should have done, it failed to see that the evidence could not support a finding that Wolf's decision to deny Ezold admission to the partnership was based upon a sexually discriminatory motive rather than the firm's assessment of her legal qualifications. Accordingly, we hold not only that the district court analyzed the evidence improperly and that its resulting finding of pretext is clearly erroneous, but also that the evidence, properly analyzed, is insufficient to support that finding and therefore its ultimate conclusion of discrimination cannot stand. We will therefore reverse and remand for entry of judgment in favor of Wolf. This disposition makes it unnecessary to address the issues raised in Wolf's appeal concerning the remedy the district court awarded to Ezold or those in Ezold's cross-appeal concerning her claim of constructive discharge.

I.

Ezold sued Wolf under Title VII alleging that Wolf intentionally discriminated against her because of her sex when it decided not to admit her to the firm's partnership. She further alleged that she was constructively discharged by reason of the adverse partnership decision. The court bifurcated the issues of liability and damages. After a lengthy bench trial the district court rendered its Findings of Fact and Conclusions of Law on November 29, 1990. *See Ezold v. Wolf, Block, Schorr and Solis-Cohen,* 751 F.Supp. 1175 (E.D.Pa.1990) (*Ezold I*). It entered judgment in favor of Ezold on her claim for intentional discrimination and against her on her claim for constructive discharge.

The district court held that the nondiscriminatory reason articulated by Wolf for its rejection of Ezold's candidacy-that her legal analytical ability failed to meet the firm's partnership standard-was a pretext. It stated:

> Ms. Ezold has established that the defendant's purported reasons for its conduct are pretextual. The defendant promoted to partnership men having evaluations substantially the same or inferior to the plaintiff's, and indeed promoted male associates who the defendant claimed had precisely the lack of analytical or writing ability upon which Wolf, Block purportedly based its decision concerning the plaintiff.... Such differential treatment establishes that the defendant's reasons were a pretext for discrimination.

Id. at 1191-92 (Conclusion of Law (COL) 11). The district court also held that four instances of conduct by Wolf supported its finding of pretext: (1) Ezold was evaluated negatively for being too involved with women's issues in the firm; (2) a male associate's sexual harassment of female employees at the firm was seen as "insignificant" and not mentioned to the Associates Committee prior to the partnership decision; (3) Ezold was evaluated negatively for being very demanding, while male associates were evaluated negatively for lacking assertiveness; and (4) Ezold "was the target of several comments demonstrating [Wolf's] differential treatment of her because she is a woman." *Id.* at 1192 (COL 12).

In holding that Ezold had failed to establish that she was constructively discharged, the district court stated:

> A reasonable person in Ms. Ezold's position would not have deemed her working conditions to be so intolerable as to feel compelled to resign.

Id. (COL 16). This holding became relevant to the issue of damages. By way of relief, Ezold sought backpay as well as instatement in the firm as a partner, and if such instatement was impractical, front pay. Wolf argued to the district court that its holding that Ezold was not constructively discharged limited her relief to back pay covering the period from her unlawful denial of admission to the partnership, effective February 1, 1989, until the date of her voluntary resignation from the firm on June 7, 1989. On March 15, 1991, the district court decided that its holding against Ezold on her constructive discharge ***514** claim did not preclude her from obtaining relief for the period following her voluntary resignation. *See Ezold v. Wolf, Block, Schorr and Solis-Cohen,* 758 F.Supp. 303 (E.D.Pa.1991) (*Ezold II*).

The parties then briefed the issue of whether Ezold properly mitigated her damages as required by section 706(g)(1) of Title VII, 42 U.S.C.A. § 2000e-5(g)(1). On July 23, 1991, the district court issued its final memorandum and order. It ruled that Ezold had properly mitigated her damages and that her rejection of Wolf's offer to admit her as a partner as of February 1, 1990 if she accepted responsibility for its domestic relations practice did not toll Wolf's liability for back pay. The court then awarded Ezold back pay in the amount of $131,784.00 for the period from her resignation on June 7, 1989 to January 31, 1991. The parties agreed that if the court's November 27, 1990 and March 15, 1991 orders were affirmed on appeal, Ezold would be instated as a partner.[2] The court incorporated this agreement into its orders. The district court also awarded Ezold attorney's fees and costs. Wolf timely appealed from the district court's orders. Ezold filed a protective cross-appeal from the district court's denial of her constructive discharge claim.

II.

Ezold was hired by Wolf as an associate on a partnership track in July 1983. She had graduated in the top third of her class from the Villanova University School of Law in 1980 and then worked at two small law firms in Philadelphia. Before entering law school, Ezold had accumulated thirteen years of administrative and legislative experience, first as an assistant to Senator Edmund Muskie, then as contract administrator for the Model Cities Program in Philadelphia, and finally as Administrator of the Office of a Special Prosecutor of the Pennsylvania Department of Justice.

Ezold was hired at Wolf by Seymour Kurland, then chairman of the litigation department. The district court found that Kurland told Ezold during an interview that it would not be easy for her at Wolf because "she was a woman, had not attended an Ivy League law school, and had not been on law review." *Ezold I,* 751 F.Supp. at 1177 (Finding of Fact (FOF) 18). Subsequent to this meeting, but prior to accepting Wolf's offer of employment, Ezold had lunch with Roberta Liebenberg and Barry Schwartz, both members of the litigation department. She did not ask them anything about the firm's treatment of women.

Ezold was assigned to the firm's litigation department. From 1983-87, Kurland was responsible for the assignment of work to associates in the department. He often delegated this responsibility to partner Steven Arbittier. As Ezold acknowledged, many partners bypassed the formal assignment procedure and directly assigned matters to associates. The district court found that Arbittier assigned Ezold to actions that were "small" by Wolf standards. *Id.* at 1178 (FOF 24).

Ezold's performance was reviewed regularly throughout her tenure pursuant to Wolf's evaluation process, which operates as follows: The Associates Committee, consisting of ten partners representing each of the firm's departments, first reviews the performance of all the firm's associates and makes recommendations to the firm's five-member Executive Committee as to which associates should be admitted to the partnership. The Executive Committee then reviews the partnership recommendations of the Associates Committee and makes its own recommendations to the full partnership. The firm's voting partners consider only those persons whom the Executive Committee recommends for admission to the partnership.

Senior associates within two years of partnership consideration are evaluated annually; non-senior associates are evaluated semi-annually. The firm's partners are asked to submit written evaluations on ***515** standardized forms.[3] The partner is asked the degree of contact he has had with the associate during the evaluation period. Partners were instructed that the evaluations were to be completed regardless of the extent of the evaluating partner's contact or familiarity with the associate's work. Ten criteria of legal performance are listed on the forms in the following order: legal analysis, legal writing and drafting, research skills, formal speech, informal speech, judgment, creativity, negotiating and advocacy, promptness and efficiency. Ten personal characteristics are also listed: reliability, taking and managing responsibility, flexibility, growth potential, attitude, client relationship, client servicing and development, ability under pressure, ability to work independently, and dedication. As stated by Ian Strogatz,[4] Chairman of the Associates Committee: "The normal standards for partnership include as factors for consideration all of the ones ... that are contained [on] our evaluation forms." Joint Appendix (App.) at 1170.

Despite format changes, legal analysis was always listed as the first criterion to be evaluated. This criterion was defined on the evaluation forms used in 1987 and 1988 as the "ability to analyze legal issues; grasp problems; collect, organize and understand complex factual issues." *Id.* at 3728. Partners provide grades as well as written comments on these criteria. The evaluation forms describe the grades as follows:

> -**DISTINGUISHED**: Outstanding, exceptional; consistently demonstrates extraordinary adeptness and quality; star.
>
> -**GOOD**: Displays particular merit on a consistent basis; effective work product and performance; able; talented.
>
> -**ACCEPTABLE**: Satisfactory; adequate; displays neither particular merit nor any serious defects or omissions; dependable.
>
> -**MARGINAL**: Inconsistent work product and performance; *sometimes* below the level of what you expect from Associates who are acceptable at this level.
>
> -**UNACCEPTABLE**: Fails to meet minimum standard of quality expected by you of an associate at this level; *frequently* below level of what you expect.

Id. at 3464 (emphasis in original).

The form asks the evaluating partner to describe any particular strengths or weaknesses of an associate. Partners are also asked to indicate their views on the admission of each senior associate to the partnership. The evaluation lists five possible responses: "with enthusiasm," "with favor," "with mixed emotions," "with negative feelings" or "no opinion." Partners are also asked to respond "yes" or "no" to the following question: "I would feel comfortable turning over to this Associate to handle on his/her own a significant matter for one of my clients." *Id.* at 3467. Given the number of reviewing partners, the evaluations often contain a wide range of divergent views.

These evaluations are then compiled and summarized by the firm's administrative staff and organized in books for review by the Associates Committee. *Ezold I*, 751 F.Supp. at 1181 (FOF 52). Each member of the Associates Committee is asked to make an initial assessment of the evaluations pertaining to one of the associates or candidates for partnership. That committee member prepares a form entitled "Committee Member's Associate Evaluation Summary" summarizing his or her personal view of each associate's evaluations. This form is colloquially referred to as the "bottom line" memo. As found by the district court, the bottom line memo "is intended to be [the Associates Committee member's] own personal view of what he has gleaned from the evaluations submitted at the time by the partners who submitted evaluation forms, *plus anything in addition that [the Associates Committee member] has* ***516** *gleaned from any interviews that he has conducted with respect to those evaluations.*" *Id.* at 1181 (FOF 53) (emphasis in original). The bottom line memo also contains a "grid" reflecting the Associates Committee member's summary of the evaluated associate's grades in legal and personal skills.

The bottom line memo also assesses a senior associate's prospects for regular partnership (Category VI) under the following ratings: "more likely than not," "unclear," "less likely than not" or "unlikely." In 1987 and 1988, similar rankings were used to determine the associate's potential for special partnership (Category VII). The Category VII partnership then in existence conferred a non-equity "partnership" status upon associates who fell below the normal standard for admission as equity partners but whose work nevertheless was making a valuable contribution to the firm. *See id.* at 1177 (FOF 15).

Each member of the Associates Committee receives copies of the bottom line memo for all associates before meeting formally to discuss evaluations. The bottom line memo serves as a starting point for the Associates Committee's discussion of each candidate. The Committee members, using both the bottom line memo and the administrative summaries of the grades and comments, engage in a process of weighing and comparing each associate's legal skills and personal characteristics. The Committee also conducts interviews of those partners who failed to submit written evaluations of an associate during an evaluation period, submitted an evaluation that requires clarification or asked for an opportunity to supplement the written evaluation in an interview.5 Strogatz testified that the Committee has no formal voting procedure. *Id.* at 1181 (FOF 57). It ultimately reaches its own consensus as to each senior associate's partnership potential and as to each associate's performance. It also formulates a performance review that will be given to each associate and senior associate by a member of the Committee.

The firm's partners evaluated Ezold twice a year as an associate and once a year as a senior associate from October 1983 until the Associates Committee determined that it would not recommend her for partnership in September 1988. The district court found that "[i]n the period up to and including 1988, Ms. Ezold received strongly positive evaluations from almost all of the partners for whom she had done any substantial work." *Id.* at 1182 (FOF 60).6 In making this finding the district court relied on the evaluations of Wolf partners Seymour Kurland, Robert Boote, Steve Goodman, Barry Schwartz, Alan Davis and Raymond Bradley. Ezold's overall score in

legal skills in the 1988 bottom line memorandum before the Associates Committee was a "G" for good. It was noted that "overall" that year she received "stronger grades in intellectual skills than last time." *Id.* at 1183 (FOF 71).

Evaluations in Ezold's file not mentioned by the district court show that concerns over Ezold's legal analytical ability arose early during her tenure at the firm. In an evaluation covering the period from November 1984 through April 1985, Arbittier wrote:

> I have discussed legal issues with Nancy in connection with [two cases]. I found her analysis to be rather superficial and unfocused. I am beginning to doubt that she has sufficient legal analytical ability to make it with the firm.... She makes a good impression with people, has common sense, and can handle routine matters well. However these traits will take you just so far in our firm. I think that due to the nature of our practice Nancy's future here is limited.

App. at 3392. That same year Schwartz wrote:

> ***517** I have worked a great deal with Nancy since my last evaluation.... Both cases are complex, multifaceted matters that have presented novel issues to us. While her enthusiasm never wanes and she keeps plugging away-I'm often left with a product that demonstrates uncertainty in the analysis of a problem. After extensive discussions with me, the analysis becomes a little more focused, although sometimes I get the sense that Nancy feels adrift and is just marching as best she can to my analytical tune.... In my view her energy, enthusiasm and fearlessness make her a valuable asset to us. While she may not be as bright as some of our best associates, her talents will continue to serve us well.

Id. at 3392. Also in 1985, partner Donald Joseph rated Ezold's legal analytical ability as marginal and wrote "[i]ts [sic] too early to tell but I have been disappointed on her grasp of the problem, let alone performance." *Id.*

During her next evaluation period from April through November 1985, Ezold received similar negative evaluations. Arbittier, Robert Fiebach and Joseph rated her legal analytical abilities as marginal. Arbittier wrote:

> She took a long time getting [a summary judgment brief] done and I found it to be stilted and unimaginative. One of the main issues-dealing with the issue of notice-she missed completely and did not grasp our position.... Also, in considering whether to file a defensive motion ... she failed to cite me to a clause in the agreement that was highly relevant leaving me with the impression that the motion could not succeed. I think Nancy tries hard and can handle relatively straight-forward matters with a degree of maturity and judgment, but when she gets into more complicated areas she lacks real analytical skill and just does what she is told in a mechanical way. She is not up to our minimal Wolf, Block standards.

Id. at 3376. Boote made the following report on his performance review with Ezold after this evaluation period:

> Nancy appeared to accept the judgment, albeit a little grudgingly, that her analytical, research and writing ability was not up to our standards and that she should focus on the types of matters that she can handle effectively.... We made it very clear to Nancy that if she pursues general civil litigation work she is not on track toward partnership and that her only realistic chance for partnership in our opinion is to develop a good reputation for herself in one of the specialized areas of practice.

Id. at 3375.

In the evaluation period covering November 1985 to April 1986, Boote wrote the following to the Associates Committee:

> Nancy continues to get mixed reviews. Her pluses are that she is mature, courageous, pretty good on her feet and has the capacity to inspire confidence in clients. Her minuses are that there is doubt about her analytic and writing ability.... In considering Nancy's prospects for the long range, I think we should bear in mind that we have made mistakes in the past in letting people go to other firms who really could have

> filled a valuable niche here. Whether Nancy is such a person, of course, remains to be seen.

Id. at 3365.

A summary of Ezold's performance review from October 1986 prepared by Schwartz stated:

> Nancy was advised that several of the lawyers feel she has made very positive progress as a lawyer, Sy [Kurland] being one of them. However, he told her that other lawyers had strong negative sentiments about her capabilities and they feel she has a number of shortcomings in the way of complicated analysis of legal problems and in being able to handle the big complicated corporate litigation, and therefore, does not meet the standard for partnership at Wolf, Block.... Both Sy and I urged Nancy to seriously consider looking for employment elsewhere as she may not be able to turn the tide.

Id. at 3364.

Although several partners saw improvement in Ezold's work, negative comments ***518** about her analytical ability continued up until, and through, her 1988 senior associate evaluation, the year she was considered for partnership. A summary of her evaluations for 1987 and 1988, focusing on the grades and comments she received in the category of legal analysis, follows:[7]

***519** During the 1987 evaluation period, two partners viewed Ezold's eventual admission to the partnership "with enthusiasm," sixteen "with favor," eight "with mixed emotions" and seven with "negative feelings." *Id.* at 3346. The Associates Committee formed a consensus that Ezold's analytical ability fell below the firm's standards. It predicted her partnership chances as "unclear" and if she was made a partner it would most likely be a Category VII partner because there was substantial doubt as to her legal ability. *Id.* at 3349. At trial Ezold acknowledged that during her evaluation meeting for this period she was told that "there were partners who criticized [her] writing ability and questioned [her] ability to handle complex litigation, perhaps criticized or questioned [her] ability in the area of legal analysis." *Id.* at 666.

1988 Evaluations

Partner Name	***Grade (Legal Analysis)***	**Comments**

Rosenblum	A	"On a very complicated matter primarily involving financial analysis, I am not sure whether or not [Ezold] grasped analysis fully. (I am not sure that others working on project did either....)." Recommended partnership with "mixed emotions." *Id.* at 3488-91.
Temin	A	Slight contact. Recommended partnership "with mixed emotions." *Id.* at 3508-11.
Davis	A	"She will never be a legal scholar-but we have plenty of support in that area." Recommended partnership with "enthusiasm." *Id.* at 3512-15.
Arbittier	A	"Barely adequate legal skills"; "Her abilities are limited. She makes a good impression but she lacks real legal analytical ability." Recommended partnership with "mixed emotions." *Id.* at 3520-23.
Fiebach	M	"Nancy has certain strengths.... If directed, she will do a good job-except that she has limitations with respect to complex legal issues. However, when left on her own she does not do what has to be done until [the] case is in crisis and she does a poor job in keeping [the] client informed." Recommended partnership with "negative feelings." *Id.* at 3544-47.
Goldberger		Would feel comfortable turning over a significant matter for one of his clients "if not too complex." "Nancy reputedly can handle many of our matters on her own. If so and reliable others bear these rumors out, partnership may be in the cards." Recommended partnership with "mixed emotions." *Id.* at 3552-55.
Joseph		"[H]er abilities to grasp legal issues from the little I observed was insufficient to trust her in major litigation on her own." Recommended partnership with "negative feelings." *Id.* at 3560-63.
Poul	G	Slight contact. Recommended partnership "with favor." *Id.* at 3580-83.
Simon		"Probably ancient history-but I do recall my perception that she does

		not write well and lacks intellectual sophistication." Recommended partnership with "negative feelings." *Id.* at 3596-99.
Fala	G	"Nancy handled a moderate sized lawsuit for a client of mine. Job was done well and responsibly. Result was good." *Id.* at 3656.
Roberts	G	Slight contact; recommended partnership with "mixed emotions." *Id.* at 3688-91.
Garber		"Experience with her years ago was unsatisfactory." No opinion on partnership recommendation. *Id.* at 3756-59.
Berriman	G	Slight contact; recommended partnership "with enthusiasm." *Id.* at 3776-79.
Kaplinsky	A	"She has done a very nice job on the Home Unity shareholder litigation.... I am probably not as complimentary as Alan [Davis] might be. I was never convinced that she had a complete grasp of the accounting issues in the case." Recommended partnership "with favor." *Id.* at 3452-55.
McConomy	G	"Only worked on one matter for me. She is doing a super job." Recommended partnership "with favor." *Id.* at 3464-67.

***520** In 1988, ninety-one partners submitted evaluations of Ezold. Thirty-two, a little more than one-third, made recommendations with varying degrees of confidence, for Ezold's admission to partnership. Seven of those partners recommended that Ezold be made a partner "with enthusiasm," fourteen "with favor," six with "mixed emotions," four with "negative feelings," and one with "mixed emotions/negative feelings." *Id.* at 3318. Three of the four partners who voted for partnership with negative feelings were members of Ezold's department. After reviewing Ezold's evaluations and conducting interviews, the Associates Committee voted 9-1 not to recommend Ezold for Category VI partnership.[11]

In a discussion initiated by Davis, the Associates Committee also debated modifying the partnership standard as a matter of general policy or specially in Ezold's case because of her other positive attributes. Davis believed:

> although [Ezold] was not up to par on her legal analytical ability, ... deficiencies in a particular area, even though it was a traditional area where we required a certain superior level, could be overlooked or relaxed to where there were sufficiently compensating skills in other areas, because I felt as chairman

> that in staffing a case, I could put together the right skills, and we had enough business where we could fit everybody in usefully and productively.

Id. at 1665, 1686. He thought the firm "just ought to come off [its] standards and be a little more creative in melding different abilities that different people might bring." *Id.* at 1685. The other Committee members ultimately rejected this suggestion.

The Associates Committee told Ezold that she would not be recommended for admission as a "Group VI" regular partner effective February 1, 1989 because "too many partners did not believe she had sufficient legal analytical ability to handle complex legal issues." *Ezold I,* 751 F.Supp. at 1189 (FOF 136). It did vote, however, to recommend her for the status of "Group VII" special partner that the firm had heretofore made available to associates who are valuable but fall below the firm's high standards for full partnership.[12] The continuing existence of that category was, however, then under review by the firm's Executive Committee. It was in fact later eliminated.

Out of a total of eight candidates in Ezold's class, five male associates and one female associate were recommended for regular partnership. One male associate, Associate X, was not recommended for either regular or special partnership.

The Executive Committee decided to review the Associates Committee's negative recommendation of Ezold and also to conduct an independent review of the negative ***521** recommendation of Associate X.[13] William Rosoff, former chairman of the Executive Committee, conducted the inquiry. Rosoff reviewed Ezold's evaluation documents and interviewed four litigation department partners: Schwartz, Boote, Arbittier and Fiebach. Rosoff had learned of the policy disagreement among some of the firm's partners as to whether the partnership standard should be relaxed in light of Ezold's other attributes. He reported to the Executive Committee that it should not recommend Ezold's admission unless it was prepared to reduce the firm's partnership standards. The 5-member Executive Committee voted unanimously not to recommend Ezold's admission as a regular partner.

On November 16, 1988 Executive Committee Chairman Charles Kopp met with Ezold and informed her of the decision. He also told her that two domestic relations partners had informed the Committee several days earlier that they were leaving the firm and that this immediate vacuum presented an opportunity for her. *Id.* at 1189 (FOF 137). He promised that if she agreed to work in this department, she would be made a regular partner in one year. Other associates passed over for partnership in the past had sometimes agreed to specialize in a certain area where the need arose and had later made partner. Although Kopp had little contact with Ezold, he believed that Ezold could handle the work because of the positive evaluations of her skills with clients and in the courtroom and because the practice area did not require the same complex analysis as the firm's commercial litigation practice. *See id.* at 1189 (FOF 137-38).[14] Ezold declined the offer. Kopp told Ezold that the firm nevertheless wanted her to stay and she could stay on as a litigation associate as long as she wanted. *Id.* at 1189 (FOF 139).

Ezold also met with Rosoff concerning the domestic relations offer. The district court found that Rosoff "told her that although he could not assure her of a partnership in the future if she declined the domestic relations partnership offer, she would be considered for partnership in the future." *Id.* at 1190 (FOF 142). He also told her that she would receive a substantial pay raise the following July when semi-annual raises are given to associates, but she would not receive the pay raise being given to the other members of her class who were recommended for partnership.[15]

Ezold remained at the firm, none of her cases were taken away from her, and Davis, then chair of the Litigation Department and one of Ezold's supporters, continued to assign her new cases. On January 25, 1989, one day after the firm's partners voted on the admission of new partners, Ezold began looking for other employment. She ultimately signed a one-year contract as president of an environmental consulting firm, a former client of Wolf, and also took an "of counsel" position with a suburban law firm. Ezold resigned from the firm on June 7, 1989.

III.

The district court had subject matter jurisdiction under 28 U.S.C.A. § 1331 (West Supp.1992) and 42 U.S.C.A. § 2000e-5(f)(3) (West 1981). We have jurisdiction over the ***522** final orders of the district court pursuant to 28 U.S.C.A. § 1291 (West Supp.1992).

IV.

Ezold claims Wolf intentionally discriminated against her because of her sex. Intentional discrimination in employment cases fall within one of two categories: "pretext" cases and "mixed-motives" cases. *See Price Waterhouse v. Hopkins,* 490 U.S. 228, 247 n. 12, 109 S.Ct. 1775, 1789 n. 12, 104 L.Ed.2d 268 (1989) (plurality). In

pretext cases, the familiar *McDonnell Douglas/Burdine* analysis applies. In a mixed motives case the *McDonnell Douglas/Burdine* analysis does not apply, and the plaintiff has the burden of showing by evidence tied to a discriminatory animus that an illegitimate factor had a "motivating" or "substantial" role in the employment decision. *Id.* at 258, 109 S.Ct. at 1794. This theory has been codified in the Civil Rights Act of 1991. *See* 42 U.S.C.A. § 2000e-2(m) (West Supp.1992). If the plaintiff makes such a showing, the burden shifts to the employer to prove by a preponderance of the evidence "that it would have reached the same [employment] decision ... even in the absence of" the impermissible factor. *Hopkins,* 490 U.S. at 244-45, 109 S.Ct. at 1787-88. There is some uncertainty in the law about the sort of evidence a plaintiff must show to shift the burden to an employer in a mixed motives case, *see Tyler v. Bethlehem Steel Corp.,* 958 F.2d 1176, 1183 (2d Cir.), *cert. denied,* 506 U.S. 826, 113 S.Ct. 82, 121 L.Ed.2d 46 (1992), but we need not address that issue here as Ezold proceeded only under the *McDonnell Douglas/Burdine* framework. *See* Transcript of Oral Argument, at 46-47 ("Your Honor ... I intended to say that this case followed standard McDonnell Douglas and Burdine.... This is a pretext case."). This is not a mixed-motive case. The issue in this case is "whether illegal or legal motives, but not both, were the 'true' motives behind the [partnership] decision." *Lockhart v. Westinghouse Credit Corp.,* 879 F.2d 43, 49 (3d Cir.1989); *see also Price Waterhouse,* 490 U.S. at 260, 109 S.Ct. at 1796 (White, J., concurring).

[1] Therefore, before considering Wolf's contentions, we think it wise to revisit the alternating burdens of proof in a Title VII discrimination case under the now familiar process set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973) and *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 252-56, 101 S.Ct. 1089, 1093-95, 67 L.Ed.2d 207 (1981). *See, e.g., Bennun v. Rutgers State Univ.,* 941 F.2d 154, 170 (3d Cir.1991), *cert. denied,* 502 U.S. 1066, 112 S.Ct. 956, 117 L.Ed.2d 124 (1992); *Roebuck v. Drexel Univ.,* 852 F.2d 715, 726-27 (3d Cir.1988). Ezold relied on this particular method of circumstantial proof of discrimination at trial. The plaintiff must first establish by a preponderance of the evidence a prima facie case of discrimination. *Burdine,* 450 U.S. at 252, 101 S.Ct. at 1093; *Bellissimo v. Westinghouse Elec. Corp.,* 764 F.2d 175, 179 (3d Cir.1985), *cert. denied,* 475 U.S. 1035, 106 S.Ct. 1244, 89 L.Ed.2d 353 (1986), *abrogated on other grounds, Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). The plaintiff can establish a prima facie case by showing that she is a member of a protected class; that she was qualified for and rejected for the position; and that non-members of the protected class were treated more favorably. *Roebuck,* 852 F.2d at 726 (citing *McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. at 1824); *see Burdine,* 450 U.S. at 252-53, 101 S.Ct. at 1093-94. After the plaintiff has established a prima facie case, the burden shifts to the defendant to produce evidence of a legitimate, nondiscriminatory reason for the employee's rejection. *Burdine,* 450 U.S. at 252, 101 S.Ct. at 1093; *Bellissimo,* 764 F.2d at 179. If the defendant's evidence creates a genuine issue of fact, the presumption of discrimination drops from the case. *Burdine,* 450 U.S. at 254-55, 101 S.Ct. at 1094-95; *Bellissimo,* 764 F.2d at 179. Then, the plaintiff, since she retains the ultimate burden of persuasion, must prove, by a preponderance of the evidence, that the defendant's proffered reasons were a pretext for discrimination. ***523** *Burdine,* 450 U.S. at 257, 101 S.Ct. at 1095; *Chipollini v. Spencer Gifts, Inc.,* 814 F.2d 893, 898 (3d Cir.) (in banc), *cert. denied,* 483 U.S. 1052, 108 S.Ct. 26, 97 L.Ed.2d 815 (1987); *Bellissimo,* 764 F.2d at 180.

[2] The parties do not dispute the district court's conclusion of law that Ezold demonstrated a prima facie case, in particular that she was "qualified" for admission to the partnership. While "more than a denial of promotion as a result of a dispute over qualifications" must be shown to prove pretext, *see Molthan v. Temple Univ.,* 778 F.2d 955, 962 (3d Cir.1985), such a dispute will satisfy the plaintiff's prima facie hurdle of establishing qualification as long as the plaintiff demonstrates that "[s]he was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made." *Bennun,* 941 F.2d at 171 (quoting *Roebuck,* 852 F.2d at 726). In Title VII cases involving a dispute over "subjective" qualifications, we have recognized that the qualification issue should often be resolved in the second and third stages of the *McDonnell Douglas/Burdine* analysis, to avoid putting too onerous a burden on the plaintiff in establishing a prima facie case, but we have refused to adopt a blanket rule. *Fowle v. C & C Cola,* 868 F.2d 59, 64 (3d Cir.1989). Because the prima facie case is easily made out, it is rarely the focus of the ultimate disagreement. *Healy v. New York Life Ins. Co.,* 860 F.2d 1209, 1214 n. 1 (3d Cir.1988), *cert. denied,* 490 U.S. 1098, 109 S.Ct. 2449, 104 L.Ed.2d 1004 (1989). We agree with the district court's conclusion that favorable evaluations from partners with whom Ezold worked, and a score of "G" on her 1988 bottom line memo, demonstrate that she was qualified for partnership consideration. *See Ezold I,* 751 F.Supp. at 1191 (COL 6).

The defendant may rebut the presumption of discrimination arising out of the plaintiff's prima facie case by producing evidence that there was a "legitimate, nondiscriminatory reason" why the plaintiff was rejected. *Burdine,* 450 U.S. at 254, 101 S.Ct. at 1094. *McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. at 1824. The Supreme

Court in *Burdine* said:

> [T]he defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext....

450 U.S. at 255-56, 101 S.Ct. at 1094-95.

[3] The burden then shifts to the plaintiff to show that the defendant's articulated reasons are pretextual. *Id.* at 256, 101 S.Ct. at 1095. This burden merges into the plaintiff's ultimate burden of persuading the court that she has been the victim of intentional discrimination. *Id.* The plaintiff must demonstrate "by competent evidence that the presumptively valid reason [ ] for [the alleged unlawful employment action] [was] in fact a coverup for a ... discriminatory decision." *McDonnell Douglas,* 411 U.S. at 805, 93 S.Ct. at 1825; Explicit evidence of discrimination-*i.e.,* the "smoking gun"-is not required. *See Bennun,* 941 F.2d at 171; *Lockhart v. Westinghouse Credit Corp.,* 879 F.2d 43, 48 (3d Cir.1989). A plaintiff can establish pretext in one of two ways: "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered reason is unworthy of credence." *Burdine,* 450 U.S. at 256, 101 S.Ct. at 1095.

[4] In proving that the employer's motive was more likely than not the product of a discriminatory reason instead of the articulated legitimate reason, sufficiently strong evidence of an employer's past treatment of the plaintiff may suffice. *See* ***524** *Patterson v. McLean Credit Union,* 491 U.S. 164, 188, 109 S.Ct. 2363, 2378, 105 L.Ed.2d 132 (1989);16 *McDonnell Douglas,* 411 U.S. at 804, 93 S.Ct. at 1825. The employer's "general policy and practice with respect to minority employment" may also be relevant. *McDonnell Douglas,* 411 U.S. at 804-05, 93 S.Ct. at 1825-26. Alternately, if a plaintiff produces credible evidence that it is more likely than not that "the employer did not act for its proffered reason, then the employer's decision remains unexplained and the inferences from the evidence produced by the plaintiff may be sufficient to prove the ultimate fact of discriminatory intent." *Chipollini,* 814 F.2d at 899.

Wolf's articulated nondiscriminatory reason for denying Ezold's admission to the partnership was that she did not possess sufficient legal analytical skills to handle the responsibilities of partner in the firm's complex litigation practice. Ezold attempted to prove that Wolf's proffered explanation was "unworthy of credence" by showing she was at least equal to, if not more qualified than, similarly situated males promoted to partnership. She also contended that her past treatment at the firm showed Wolf's decision was based on a discriminatory motive rather than the legitimate reason of deficiency in legal analytical ability that the firm had articulated.

V.

From this overview of the law, we turn to the specifics of the district court's analysis, its findings and the parties' contentions concerning them. The district court compared Ezold to eight successful male partnership candidates, Associates A-H. It found:

> The test that was put to the plaintiff by the Associates Committee that she have outstanding academic credentials and that before she could be admitted to the most junior of partnerships, she must demonstrate that she had the analytical ability to handle the most complex litigation was not the test required of male associates.

Ezold I, 751 F.Supp. at 1183 (FOF 73). The district court then concluded:

> Ms. Ezold has established that the defendant's purported reasons for its conduct are pretextual. The defendant promoted to partnership men having evaluations substantially the same or inferior to the plaintiff's, and indeed promoted male associates who the defendant claimed had precisely the lack of analytical or writing ability upon which Wolf, Block purportedly based its decision concerning the plaintiff. The defendant is not entitled to apply its standards in a more "severe" fashion to female associates.... Such differential

> treatment establishes that the defendant's reasons were a pretext for discrimination.

Id. at 1191-92 (COL 11) (citations omitted).

Wolf says this finding of pretext is wrong. Analyzing its contentions, we perceive two reasons why this is so. First, the district court's finding that Ezold was required to have outstanding academic credentials before she could be admitted to partnership is without factual support in the record. The only evidence in the record that Wolf considered Ezold's academic record is limited to the original decision to hire Ezold and to assignments given to Ezold early in her employment with Wolf, issues we consider in Part IX, *infra.* Second, in its analysis, the district court did not focus on Wolf's articulated reason for denying Ezold partnership-lack of analytic ability to handle complex litigation. Instead, the district court first substituted its own general standard for the qualities Wolf believed were essential to law firm partnership. Then, applying its own incorrect standard of comparison, the district court did not realize that a comparison of Ezold's legal analytic ability with that of the successful ***525** males could not support a finding of pretext. Overall, Ezold's evaluations in that category were not as good as that of even the least capable male associate who was offered a partnership position.

VI.

Wolf contends that in all aspects of its analysis the district court improperly substituted its own subjective judgment-not only concerning what the firm's partnership standard should be-but also concerning whether Ezold met this standard. Specifically, it alleges that the district court ignored the negative evaluations concerning Ezold's legal analytical ability that are in the record; looked beyond the criterion of legal analysis, Wolf's articulated nondiscriminatory reason, in comparing Ezold to male associates admitted to the partnership; failed to make findings concerning male associates denied admission to the partnership based on their deficient legal analytical ability; and excluded from evidence the evaluation files of female associates admitted to the partnership who received criticisms similar to male associates admitted to the partnership in areas other than legal analysis. Initially, Wolf argues our review of these issues is plenary.

Wolf relies on *Logue v. International Rehabilitation Associates, Inc.,* 837 F.2d 150 (3d Cir.1988), for the proposition that we exercise plenary review over the district court's determinations on these questions. Ezold responds that Wolf is trying to obtain plenary review by couching a challenge to the sufficiency of the evidence as legal error in the selection of the appropriate standards for determining discrimination. In *Logue* the defendant asserted on appeal that the district court incorrectly applied the legal standard for sex discrimination by failing to address and make findings of fact on all of the legitimate, nondiscriminatory reasons it offered in support of its termination of the plaintiff's employment. *Id.* at 153. We held that by failing to address all of the defendant's proffered reasons the district court erred as a matter of law, misapplied the legal standard governing sex discrimination and deprived the defendant of the full trial process contemplated by *Burdine. Id.* at 154.

[5] This case is distinguishable from *Logue.* Here, the district court did consider Wolf's articulated nondiscriminatory reason and did make findings upon it. Wolf contends the district court's findings are incomplete and that those it did make do not support its ultimate finding of pretext. Plenary review is appropriate in order to determine the extent to which essential findings are missing. The district court's refusal to credit or make findings concerning all of Wolf's proffered evidence, however, does not subject its express findings to plenary review. Those findings cannot be set aside unless they are clearly erroneous. A finding becomes clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (quoting *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)). When there are two permissible views of the evidence, the district court's choice of one view cannot be clearly erroneous. *Id.* at 574, 105 S.Ct. at 1511.

[6] The district court's resolution of the ultimate issue whether Wolf's reason for denying Ezold's admission to the partnership was a pretext is a finding of fact subject to the clearly erroneous standard set forth in Federal Rule of Civil Procedure 52(a). *See id.* at 573, 105 S.Ct. at 1511; *Bellissimo,* 764 F.2d at 179. We may reverse the district court on this finding of fact only if the evidence is insufficient to permit a rational factfinder to infer that Wolf's assertion that Ezold was wanting in legal analytic ability was a mask for unlawful sex discrimination.

Wolf's disagreement with the method of analysis the district court employed leads naturally to its challenge to the sufficiency of the evidence to support the district court's finding of pretext and its ultimate conclusion of unlawful discrimination. ***526** Thus, Wolf contended at oral argument before this Court: "[t]here is no proof, in this case, of a gender-driven result." Transcript at 59. In considering a challenge to the sufficiency of the evidence,

we must determine based on our own "comprehensive review of the entire record" whether Ezold has satisfied her ultimate burden of proving intentional sex discrimination. *Bennun,* 941 F.2d at 170; *Bellissimo,* 764 F.2d at 178-79. In doing so, we view the evidence in the light most favorable to Ezold. *See Roebuck,* 852 F.2d at 727-28 (citing *Dreyer v. Arco Chem. Co.,* 801 F.2d 651, 654 (3d Cir.1986), *cert. denied,* 480 U.S. 906, 107 S.Ct. 1348, 94 L.Ed.2d 519 (1987)). We again defer to the district court's factual findings, including once more its ultimate finding, and we cannot reverse any of them unless they are clearly erroneous. *Bellissimo,* 764 F.2d at 178-79.

VII.

[7] Wolf's articulated reason for refusing to offer Ezold a partnership was its belief, based on a subtle and subjective consensus among the partners, that she did not possess sufficient legal analytic ability to handle complex litigation. Wolf never contended that Ezold was not a good courtroom lawyer, dedicated to her practice, and good with clients. Instead, many partners felt, because of the level of her legal analytical ability, that she could not handle partnership responsibilities in the firm's complex litigation practice. Absent evidence to show that legal analytic ability was not a necessary precondition for partnership at Wolf, the district court's opinion about Ezold's comparative strengths in the other categories on the evaluation form is immaterial.

A.

The record does not show that anyone was taken into the partnership without serious consideration of their strength in the category of legal analytic ability.[17] The evaluations specifically asked each partner whether he or she would feel comfortable turning over to the partnership candidate "to handle on his/her own a significant matter for one of my clients." *See* App. at 3423. Several of the partners' responses to this question on Ezold's evaluations show clear concern about the depth of her legal analytical capabilities. *See, e.g.,* App. at 3348 ("I would not want her in charge of a large legally complex case, the traditional measure of a Wolf, Block partner."). This same question, reflecting a requirement that an applicant exhibit analytical abilities sufficient to meet Wolf's perception of the firm's standard, was considered throughout the firm's evaluations of the male associates with whom Ezold was competing. *See, e.g.,* App. at 4257 ("I just am concerned if he could 'first chair' a case."); App. at 4823 ("He [Associate H] can handle the most complex litigation we have."); App. at 4532 ("Based on [Associate C's] ability to analyze a legal problem I could feel comfortable in turning over my best client to him for a significant matter."); App. at 5044 ("[There are] questions about his intellectual strength, his ability to manage complex transactions and his level of attention to detail"); App. at 4696 ("[H]e just doesn't have the high level of intelligence we need to handle complex legal questions."). Ezold herself acknowledged at trial that because of the nature of Wolf's litigation practice, its litigators devote much more time to legal analysis than in-court trial work.

Davis, a member of the Associates Committee who favored partnership for Ezold, testified that he recognized her shortcomings in the area of legal analytic ability. Thus, he advocated a relaxation of the partnership standard to accommodate her because he believed that her other skills "outweighed whatever deficiencies she had in the legal ability area." App. at 1684. The Associates Committee and the Executive Committee ultimately refused to relax the firm's standards. Such a refusal to relax ***527** standards, however, is not evidence of discrimination.

Wolf reserves for itself the power to decide, by consensus, whether an associate possesses sufficient analytical ability to handle complex matters independently after becoming a partner. It is Wolf's prerogative to utilize such a standard. In *Billet v. CIGNA Corp.,* 940 F.2d 812 (3d Cir.1991), an age discrimination case, we stated that "[b]arring discrimination, a company has the right to make business judgments on employee status, particularly when the decision involves subjective factors deemed essential to certain positions." *Id.* at 825. We stated again that "[a] plaintiff has the burden of casting doubt on an employer's articulated reasons for an employment decision. Without some evidence to cast this doubt, this Court will not interfere in an otherwise valid management decision." *Id.* at 828 (citing *Lucas v. Dover Corp.,* 857 F.2d 1397, 1403-04 (10th Cir.1988) (a court will not second guess business decisions made by employers, in the absence of some evidence of impermissible motives)); *see Loeb v. Textron, Inc.,* 600 F.2d 1003, 1012 n. 6 (1st Cir.1979) ("While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination.").

The partnership evaluation process at Wolf, though formalized, is based on judgment, like most decisions in human institutions. A consensus as to that judgment is the end result of Wolf's formal process. In that process, the Associates Committee has the role of collecting and weighing hundreds of evaluations by partners with diverse views before reaching its consensus as to a particular associate's abilities. The consensus, the Associates

Committee reaches is then passed on to the Executive Committee. After its review and, at least in Ezold's case, additional independent investigation, the Executive Committee submits its final recommendation to the partners for a vote.

The differing evaluations the partners first submit to the Associates Committee are often based on hearsay or reputation. No precise theorem or specific objective criterion is employed. *Cf. Bennun,* 941 F.2d at 179 (not "unwarranted invasion" of college's tenure process for district court "to determine that [professor] was held to higher standards in *objective terms, i.e.* number of publications") (emphasis added). We have cautioned courts on several occasions to avoid unnecessary intrusion into subjective promotion decisions in the analogous context of academic tenure. While such decisions are not insulated from judicial review for unlawful discrimination,

> it is clear that courts must be vigilant not to intrude into that determination, and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure. Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals....

Id. at 181 (Sloviter, C.J., dissenting from denial of petition for rehearing) (quoting *Kunda v. Muhlenberg College,* 621 F.2d 532, 548 (3d Cir.1980)). These cautions against "unwarranted invasion or intrusion" into matters involving professional judgments about an employee's qualifications for promotion within a profession inform the remainder of our analysis.

B.

In Ezold's case, the district court correctly recognized the legal premise that should have governed its result: Title VII prohibits only "discrimination." Therefore, "consideration of the practices of the [firm] toward the plaintiff must be evaluated in light of its practices toward the allegedly more favored group, in this case males." *Kunda,* 621 F.2d at 538.

The district court, however, failed to apply this legal premise to the evidence before it. It disagreed not only with Wolf's assessment of Ezold's ability to meet Wolf's standards, but also with Wolf's ***528** partnership standards themselves. For example, it found:

> In the magnitude of its complexity, a case may have a senior partner, a younger partner, and an associate(s) assigned to a case. Accordingly, requiring the plaintiff to have the ability to handle on her own any complex litigation within the firm before she was eligible to be a partner was a pretext.

Ezold I, 751 F.Supp. at 1188 (FOF 121). The district court disagreed with Wolf's decision not to overlook Ezold's deficiency in legal analysis because of her other skills and attributes, but the court is not a member of Wolf's Associates Committee or Executive Committee. Its belief that Wolf's high standard of analytical ability was unwise in light of the staffing of senior partners on complex cases does not make Wolf's standard a pretext for discrimination.

[8] The evaluations that the district court did rely upon in making its finding of pretext praised Ezold for skills other than legal analysis, such as client relations and ability in court, that Wolf never disputed she possessed. Where an employer produces evidence that the plaintiff was not promoted because of its view that the plaintiff lacked a particular qualification the employer deemed essential to the position sought, a district court should focus on the qualification the employer found lacking in determining whether non-members of the protected class were treated more favorably. Without such a limitation, district courts would be routinely called upon to act as members of an employer's promotion board or committee. It would subjectively consider and weigh all the factors the employer uses in reaching a decision on promotion and then make its own decision without the intimate knowledge of the history of the employer and its standards that the firm's decisionmakers use in judging the degree to which a candidate exhibits a particular qualification that the employer has decided is of significance or primary importance in its promotion process. Pretext is not established by virtue of the fact that an employee has received some favorable comments in some categories or has, in the past, received some good evaluations. *See, e.g., Billet,* 940 F.2d at 826; *Turner v. Schering-Plough Corp.,* 901 F.2d 335, 343-44 (3d Cir.1990); *Healy,* 860 F.2d at 1215; *see also Frieze v. Boatmen's Bank,* 950 F.2d 538, 541 (8th Cir.1991) ("An employer rating an employee as competent discredits the employer's stated reason for discharging the employee, however, only when the employer's stated reason is the employee's *general* incompetence.") (emphasis added). It was not for the

district court to determine that Ezold's skills in areas other than legal analysis made her sufficiently qualified for admission to the partnership.

The district court's method of comparing Ezold to "similarly situated" male associates admitted to the partnership points up this initial flaw in its analysis. It engaged in a "pick and choose" selection of various comments concerning the male associates' personalities, work habits, and other criteria besides legal analysis, conducted its own subjective weighing process and then found that "[m]ale associates who received evaluations no better than [Ezold] and sometimes less favorable than [her] were made partners." *Ezold I,* 751 F.Supp. at 1184 (FOF 75). In doing so, the district court made no reference to the many favorable evaluations of the analytical ability of these male associates.

Hopkins v. Price Waterhouse, 618 F.Supp. 1109 (D.D.C.1985), *aff'd in relevant part,* 825 F.2d 458 (D.C.Cir.1987), *rev'd on other grounds,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality), is instructive. There the dispute centered in part on whether Price Waterhouse's concern about the plaintiff's interpersonal skills was a legitimate, nondiscriminatory reason to deny her partnership, or whether it was unworthy of credence. The district court held that "[i]t is clear that the complaints about the plaintiff's interpersonal skills were not fabricated as a pretext for discrimination." 618 F.Supp. at 1114. Contemporaneous evaluations "conducted well before the plaintiff was proposed for partnership" reflected numerous criticisms of her interpersonal skills, ***529** and "[e]ven partners who strongly supported her partnership candidacy acknowledged these deficiencies." *Id.* The plaintiff in *Hopkins* had contended that men with problems in interpersonal skills were invariably admitted to the partnership. The district court disagreed, stating:

> [T]he plaintiff has identified two male candidates who were criticized for their interpersonal skills because they were perceived as being aggressive, overbearing, abrasive or crude, but were recommended by the Policy Board and elected partner. Price Waterhouse points out that in both cases the Policy Board expressed substantial reservations about the candidates' interpersonal skills but ultimately made a "business decision" to admit the candidates because they had skills which the firm had a specific, special need [for] and the firm feared that their talents might be lost if they were put on hold.... In addition, these candidates received fewer evaluations from partners recommending that they be denied partnership and the negative comments on these candidates were less intense than those directed at the plaintiff.

Id. at 1115.[18]

The district court's comparison of Ezold with the successful male candidates in categories other than legal analytic ability does not lend support to its ultimate finding of pretext. The district court could not overturn Wolf's judgment that Ezold did not meet its standards for legal analytic ability without finding that Wolf's conclusions as to Ezold's legal analytic ability were pretextual. That finding, in order to stand, has to be based on evidence showing either that Wolf's asserted reason for denying Ezold a partnership position was not credible-either through comparison of her ability in that category, as Wolf perceived it, with the successful male associates, or by evidence showing that Wolf's decision not to admit Ezold to the partnership was more likely motivated by a discriminatory reason than by her shortcomings in legal analytic ability.

C.

Were the factors Wolf considered in deciding which associates should be admitted to the partnership objective, as opposed to subjective, the conflicts in various partners' views about Ezold's legal analytical ability that this record shows might amount to no more than a conflict in the evidence that the district court as factfinder had full power to resolve. The principles governing valid comparisons between members of a protected minority and those fortunate enough to be part of a favored majority reveal an obvious difficulty plaintiffs must face in an unlawful discrimination case involving promotions that are dependent on an employer's balanced evaluation of various subjective criteria. This difficulty is the lack of an objective qualification or factor that a plaintiff can use as a yardstick to compare herself with similarly situated employees. In *Bennun,* the reason Rutgers assigned for denying Bennun's promotion to the position of tenured professor was the "poor quality and insufficient quantity of his research." *Bennun,* 941 F.2d at 177. Because Bennun's research product could be measured against the judgment of his academic peers and, by that judgment, objectively compared with the research of a successful candidate for professor, Bennun was able to show the reason the University advanced for denying him the rank of professor was incredible. He did so by proving that he had published a higher number of articles than the similarly situated non-hispanic member of the faculty who had been granted

professorial rank and that his articles had received more favorable reviews from internationally known scholars. *Id.* By objectively comparing Bennun's published research with that of the favored candidate, the district court rationally found that Bennun was held to higher standards than a non-Hispanic. This Court held that this ***530** finding was not clearly erroneous and thus laid a proper foundation for the district court's circumstantial inference that Rutgers' articulated reason for denying Bennun promotion was a pretext. *Id.* at 179-80.

Similarly, in *Kunda,* the district court held that Muhlenberg's asserted reason for not promoting Kunda, lack of a master's degree, "was pretextual in view of its promotion of male members of the department who did not have masters' degrees." 621 F.2d at 539. We affirmed, stating:

> Muhlenberg's attempt to explain and distinguish each of the three situations [in which male members without master's degrees were promoted] raised a factual issue which the trier of fact decided against it. We cannot say that the record is barren of any evidence to support the trial court's findings, and therefore will affirm its ultimate conclusion that plaintiff was discriminated against on the basis of sex in the denial of a promotion.

Id. at 545.

The record shows a 9-1 consensus among the members of the Associates Committee that Ezold's admission to the partnership was "unlikely" because of their overall assessment of her legal analytical ability. It was followed by the unanimous negative vote of the Executive Committee and the entire partnership. The positive evaluations of some partners concerning Ezold's skills in areas other than legal analysis do not show the reason Wolf advanced for denying partnership to Ezold was incredible and so a pretext for discrimination.

Ezold, unlike the plaintiffs in *Bennun* and *Kunda,* is not able to point to an objectively quantifiable factor by which Wolf compared her qualifications against those of the male associates considered for partnership. Wolf's articulated reason, lack of legal analytic ability to handle complex litigation, like all its other criteria, involves subjective assessment of an associate's manifested behavior and performance.[19]

D.

Here, the district court not only based its finding of pretext on invalid comparisons, but it also ignored evidence Wolf produced to compare Ezold's shortcomings with the strengths of the successful male candidates in the category of legal analytic ability.

Thus, Wolf also argues the district court ignored significant evidence by focusing only on the positive evaluations in Ezold's files and turning a blind eye to the many negative criticisms concerning her analytic ability. *Compare Ezold I,* 751 F.Supp. at 1183, *with supra* at 516-20. Wolf's attack in this respect is even more serious in its consequence than its attack on the court's use of comparisons between Ezold and the successful male candidates in categories other than legal analytic ability. The court's improper comparison of Ezold and the successful males in categories other than legal analytic ability would merely require a remand for appropriate comparison. If, however, Ezold is unable to show that she compared favorably in the category of legal analytic ability with at least one of the successful male candidates, she will have failed to show that Wolf did not pass her over for the legitimate reason it asserted. If she fails in that respect, she loses the benefit of the inference of unlawful discrimination that arises when the employer's legitimate articulated reason is shown not to be the real reason for the employer's discriminatory action. Absent that inference, Ezold cannot prevail on her *McDonnell Douglas/Burdine* theory unless she has produced direct evidence independently sufficient to show discriminatory animus, an issue we consider in Part IX, *infra. See Burdine,* 450 U.S. at 254-56, 101 S.Ct. at 1094-95. *Compare McDonnell Douglas,* 411 U.S. at 801, 93 S.Ct. at 1823-24 ("The broad, overriding interest, shared by employer, employee, and consumer, is efficient ***531** and trustworthy workmanship assured through fair and ... neutral employment and personnel decisions.") *with Burdine,* 450 U.S. at 259, 101 S.Ct. at 1096 ("Title VII, however, does not demand that an employer give preferential treatment to minorities or women.") (citing 42 U.S.C.A. § 2000e-2(j)).

We are not unmindful of the difficult task a plaintiff faces in proving discrimination in the application of subjective factors. It arises from an inherent tension between the goal of all discrimination law and our society's commitment to free decisionmaking by the private sector in economic affairs.

The fact that Wolf's articulated reason for rejecting Ezold, lack of legal analytical ability, involves subjective and not objective factors subject to easy measurement does not, therefore, insulate the partnership decision from all review. When an employer relies on its subjective evaluation of the plaintiff's qualifications as the reason for denying promotion, the plaintiff can prove the articulated reason is unworthy of credence by presenting persuasive

comparative evidence that non-members of the protected class were evaluated more favorably, *i.e.*, their deficiencies in the same qualification category as the plaintiff's were overlooked for no apparent reason when they were promoted to partner.[20]

[9] [10] A plaintiff does not establish pretext, however, by pointing to criticisms of members of the non-protected class, or commendation of the plaintiff, in categories the defendant says it did not rely upon in denying promotion to a member of the protected class. Such comments may raise doubts about the fairness of the employer's decision. "The fact that a court may think that the employer misjudged the qualifications of the applicant does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination." *Burdine*, 450 U.S. at 259, 101 S.Ct. at 1097; *see also Billet*, 940 F.2d at 825. It does not, however, always prove the employer's reason is "unworthy of credence" in and of itself. *See McDonnell Douglas*, 411 U.S. at 804-05, 93 S.Ct. at 1825. Evidence establishing such incredibility must show that the standard or criterion the employer relied on was "obviously weak or implausible."[21] *Villanueva v. Wellesley College*, 930 F.2d 124, 131 (1st Cir.), *cert. denied*, 502 U.S. 861, 112 S.Ct. 181, 116 L.Ed.2d 143 (1991). Ezold's evidence does not make this showing.

On this issue of sufficiency, it is necessary to consider preliminarily Ezold's contention that the district court correctly refused to credit many of the negative evaluations of her analytical ability because they were by persons for whom she had never done "substantial" work. Since the district court relied on favorable evaluations of Ezold from partners who likewise had insubstantial contact with her, Ezold's argument would improperly allow the district court to apply a double standard in the use of positive, as opposed to negative, comments. For example, the district court relied on a favorable evaluation of Ezold by Bradley although he had never worked directly with her on a case. Similarly, an evaluation Robert Wolf, a retired partner in the corporate department, had written before the district court's dismissal of the complaint Ezold filed in that case, expressed his satisfaction with her handling of the client in the Union League matter. *See Firestone & Parson, Inc. v. Union League*, 672 F.Supp. 819 (E.D.Pa.1987), *aff'd mem.*, 833 F.2d 304 (3d Cir.1987). In fact, seventeen of the twenty-one partners who viewed Ezold's admission "with favor" or "with enthusiasm" had only "slight contact" or "no contact" with her during the evaluation period and based their vote solely on reputation or minimal contact.

***532** The district court's failure to consider the negative evaluations of Ezold's legal analytic ability because the partners making them had little contact with Ezold cannot be excused in the face of the credence the district court gave to positive comments about Ezold's ability from those who likewise had little or no contact with her. While a factfinder can accept some evidence and reject other evidence on the basis of credibility, it should not base its credibility determination on a conflicting double standard.

Moreover, the district court never made a finding that the critical evaluations were themselves incredible or a pretext for discrimination. There is no evidence that Wolf's practice of giving weight to negative votes and comments of partners who had little contact and perhaps knew nothing about an associate beyond the associate's general reputation was not applied equally to female and male associates. *Cf. Hopkins*, 618 F.Supp. at 1116 ("Regardless of its wisdom, the firm's practice of giving 'no' votes [by partners who had only limited contact with the candidate] great weight treated male and female candidates in the same way."). Ezold's preliminary contention that the district court did not have to consider these negative comments lacks merit. We turn therefore to an examination of the evidence comparing Ezold and the successful male candidates in the category of legal analytic ability.

A sampling of comments from the negative evaluations of Ezold's legal analytic ability reveals the extent to which the district court's refusal to consider them flawed its analysis. For example, Fiebach was one of those with negative comments about Ezold's legal analytic ability. He consistently rated Ezold's analytical skills as "marginal" long before a 1988 disagreement in the Carpenter matter.[22] *See* App. at 3190-91, 3025. Fiebach had experienced "substantial" contact with Ezold during her final two years as an associate. He recommended Ezold for partnership, with professed "negative feelings." *See* App. at 3544-47.

Fiebach was not alone in his negative comments about Ezold's legal analytic ability. Arbittier also strongly and consistently criticized Ezold in the category of legal analysis.[23] Arbittier had opposed hiring Ezold in the first instance because he did not think she had the academic credentials to make it at the firm. *See* App. at 3414 ("[p]oor academic record-well below our standards"). In a 1984 evaluation Arbittier wrote "she is doing much better than I thought she would...."[24] App. at 3397. Ezold later did work for Arbittier, and his contemporaneous evaluations indicate he was not impressed by her performance. *See id.* at 1488-89, 3380 (her brief was "stilted and unimaginative"; "she failed to cite me to a clause in the agreement that was highly relevant"; "she missed [the main issue] completely"). He ultimately recommended Ezold's admission to the partnership "with mixed emotions."

Even Ezold's strongest supporters acknowledged the shortcomings in her legal analytical ability. *See, e.g.,* App. at 3894 (Boote) ("I would not want her in charge of a large legally complex case, the traditional measure of a Wolf, Block partner."); *id.* at 3878 (Kurland) ("Nancy is an exceptionally good courtroom lawyer ... except there ***533** seems to be serious question as to whether she has the legal ability to take on large matters and handle them on her own."); *id.* at 3512 (Schwartz) ("Nancy is adequate in [legal analysis], but is not a legal scholar."); *id.* at 3956 (Davis) ("She remains a little weak in her initial analysis of complex legal issues."). These contemporaneous criticisms support Wolf's contention that the final consensus among its partners that Ezold did not, in the perception of the firm, possess the legal analytical capacity requisite to becoming a partner, and not her sex, was the reason for denying her a partnership position.

VIII.

The district court's error in failing to consider the many negative evaluations of Ezold's legal analytic ability, like its error in comparing Ezold's strengths in other categories with the successful male candidates, is not dispositive of Wolf's argument that Ezold failed to produce evidence sufficient to show she was manifestly as good as the least capable of the favored males. The failure to consider these negative comments would not be fatal to Ezold's case if there were evidence in the record that could rationally support a finding of unequal treatment by Wolf in applying its articulated reason for the screening of candidates for partnership. Thus, it remains necessary for us to examine the record in that respect.

We note at once that it shows the evaluation process at Wolf is demanding. *Cf. Watson v. Fort Worth Bank and Trust,* 487 U.S. 977, 991-92, 108 S.Ct. 2777, 2787, 101 L.Ed.2d 827 (1988) ("[o]pinions often differ when managers and supervisors are evaluated, and the same can be said for many jobs that involve ... complex and subtle tasks like the provision of professional services...."); *Zahorik v. Cornell Univ.,* 729 F.2d 85, 93 (2d Cir.1984) ("Where a broad spectrum of views is sought ... a file composed of irreconcilable evaluations is not unusual.... [T]enure files typically contain positive as well as negative evaluations, often in extravagant terms, sufficient to support either a grant or denial of tenure."). The firm may have been wrong in its perception of Ezold's legal analytic ability and, if so, its decision to pass over Ezold would be unfair, but that is not for us to judge. Absent a showing that Wolf's articulated reason of lack of ability in legal analysis was used as a tool to discriminate on the basis of sex, Ezold cannot prevail. *See Billet,* 940 F.2d at 828; *Hopkins,* 618 F.Supp. at 1116; *cf. Hishon v. King & Spalding,* 467 U.S. 69, 81, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) (Powell, J., concurring) ("The qualities of mind, capacity to reason logically ... and the like are unrelated to race or sex.").

A.

Always having in mind that the issue before us is whether the firm passed over Ezold because she is a woman, we begin our specific comparative analysis with male Associate A.

Associate A worked in Wolf's litigation department. He was recommended for partnership by the Associates Committee in the fall of 1988. He is closest to Ezold in the category of legal analysis, and, like her, received some negative evaluations over the years.[25] In its findings concerning A's evaluations, however, the district court failed to point out that no partner actually rated A lower than Ezold in the criterion of legal analysis. No partner had expressed serious problems with A's analytical ability as of 1988, the year he was up for partnership, as in Ezold's case. In fact, no partner gave A a grade below acceptable/marginal in the category of legal analysis during his final evaluation period.

Associate A received at least one and sometimes several marks of "distinguished" in this category during each evaluation period from April 1984 through 1988. Gregory Magarity, Ezold's most ardent advocate, rated A as "distinguished" in legal analysis in 1987 and 1988, higher than the grade of "good" he gave Ezold in those years. He wrote:

> ***534** [Associate A] did a magnificent job in the preparation and trial of [a case] in Indianapolis, Indiana. His written product was excellent; his support and legal analysis were likewise excellent.... You can assign [Associate A] to any of my cases.

App. at 5127. Barry Schwartz, David Doret, Donald Joseph and Donald Bean also consistently rated A as distinguished. Boote, a supporter of Ezold, also rated A higher than Ezold in this category. The record is replete with positive comments from many partners about Associate A that the district court did not refer to. In 1987 and 1988, not one partner ever gave Ezold an unqualified rating of "distinguished" in the category of legal analysis.[26]

Although Fiebach rated A as just "acceptable" in legal analysis in 1988 (App. at 6385), the district court

incorrectly compared his single rating to Ezold's "bottom line" rating of "good" which was prepared not by Fiebach, but by Associates Committee member Arthur Block based on Block's own shorthand summary of a large number of individual evaluations of Ezold's analytic ability.27 *See Ezold I*, 751 F.Supp. at 1184 (FOF 77). That same year Fiebach gave Ezold a rating of "marginal," lower than the acceptable rating he gave A in that criterion.

Strogatz had also made a critical evaluation of A in 1987, the year prior to his admission to the partnership, but Strogatz viewed A's admission to the partnership "with favor" in 1988. He wrote that "[A] is over the line," App. at 4354, and graded him as "good/acceptable" in the category of legal skills. Strogatz did not grade Ezold in this category in 1987 or 1988 because of no contact with her other than administratively. He did state, however, that "[m]y impression from others is that her legal skills are at best average and more probably marginal." App. at 3975.

Finally, in 1988, eight partners viewed A's admission to the partnership "with enthusiasm," one "with enthusiasm/favor," thirty-two "with favor," six "with mixed emotions," one "with negative feelings" and the rest had no opinion. Davis was the only partner in the firm to vote for A's admission to the partnership with a negative view. He gave A the same grade as Ezold, however, in the category of legal analysis. In 1988, seven partners viewed Ezold's admission "with enthusiasm," fourteen "with favor," six "with mixed emotions," four "with negative feelings" and one "with mixed emotions/negative feelings." A's analytical skills, while criticized by various partners, were never as consistently questioned as Ezold's. The criticisms of A, found among the comments of the partners evaluating Ezold and A, do not support a finding that Wolf's legitimate non-discriminatory reason for refusing a partnership position to Ezold was incredible. In a comparison of subjective factors such as legal ability, it must be obvious or manifest that the subjective standard was unequally applied before a court can find pretext. *See supra* at 525-26; *Villanueva*, 930 F.2d at 131. Unequal application of the criterion of legal ability is not manifest between Ezold and Associate A on this record.28 It does not contain evidence ***535** sufficient to show that Ezold was held up to a higher standard than Associate A because she was a woman.

Ezold's ability in legal analysis suffers even more in the partners' eyes when compared with the individual evaluations of the other successful male candidates. All of the other males that Wolf accepted for partnership in 1988 received many scores of distinguished in the category of legal analysis, and none of them ever received a grade of marginal in this category during his final evaluation period prior to admission to the partnership. We summarize them as follows.29

The Associates Committee recommended Male Associate B, an associate in the litigation department, for partnership in July 1989. The critical comments upon which the district court relied with respect to Associate B have nothing to do with B's legal analytical skills but focus instead upon his work habits. B's legal analysis, on the other hand, was often rated as distinguished. *See, e.g.*, App. at 4724 (Poul) ("[H]e does a remarkable job. I expect him to take over the client some day."); *id.* at 4249-51, 4268, 4280. In his last evaluation as a senior associate, six partners rated B as "distinguished" in legal analysis, and not one partner rated him below "acceptable" in this category. Davis and Magarity, Ezold's strongest supporters, graded B higher than Ezold in the category of legal analysis, recognizing his ability as "distinguished." Davis wrote on B's final evaluation that "he has produced elegantly written legal work." App. at 4281. Several partners, even those criticizing B's work habits, characterized him as "very bright." Not one partner viewed B's admission to the partnership with negative feelings.

Associate C, an associate in the real estate department, was recommended by the Associates Committee in 1987 and became a partner in February 1988. With respect to Associate C, the district court made one finding:

> 94.... In the 1987 Associates Committee bottom line memo, he received an overall grade of "G," the same as that which Ms. Ezold had received. The summary of evaluations used by the Associates Committee noted that Henry Miller, a partner in the Real Estate Department, had changed Associate C's legal analysis score to ["acceptable"] and suggested that an "adequate [score] may well be sufficient in his mind for regular partnership."

Ezold I, 751 F.Supp. at 1186.

Contrary to this single limited finding by the district court, C's legal analysis was uniformly rated as "good" or "distinguished." The district court ignored the consensus in C's department that he had a high level of legal analytical ability. *See* App. at 4542; *id.* at 4532 (Weintraub) ("Based on his ability to analyze a legal problem, I could feel comfortable in turning over my best client to him for a significant matter.") In citing Miller's grade of "acceptable" in 1987, the district court fails to point out Miller's comments that any problems with B were based on earlier work and that he had improved from that time. Twelve partners viewed C's admission "with enthusiasm," twenty-six "with favor," eight "with mixed emotions" and one "with negative feelings."

Associate D, an associate in the corporate department, was recommended for partner by the Associates Committee in

1988. In addition to other comments unrelated to D's legal analytical ability, the district court relied on the fact that in 1988 three partners said D needed help with his writing skills. *Ezold I*, 751 F.Supp. at 1186 (FOF 96). The district court failed to note that the partners who said D needed help with writing did so on the basis that English is not D's native language, as he was born and raised in a foreign country. One of the partners criticizing D's writing ability also wrote: "I'd want a close look at his drafting skills-and perhaps we should make a special effort to cultivate them-in ***536** view of the language issue." App. at 4460. Very few partners ever questioned D's legal analytical ability and he received several marks of "distinguished" during his evaluations from 1986-88. The following comments from D's file are typical: "Can handle very confusing complex structural and strategic issues.... Is a superb strategist on corporate acquisition matters." *Id.* at 4503; "[D] is unusually smart and has an instinctive grasp of business. I believe he is a star." *Id.* at 4481. Eight partners voted for his admission "with enthusiasm," twenty-seven "with favor," twelve "with mixed emotions," one "with favor/mixed emotions" and one "with negative feelings."

Associate E, an associate in the estates department, was admitted to the partnership in 1987. The district court made one finding concerning Associate E:

> 101. Mr. Strogatz stated that Associate E was not a star and that an associate did not need to be a star to be a partner. He also wrote that he thought of Associate E "as a guy just to do work."

Ezold I, 751 F.Supp. at 1186. Strogatz made this comment based on "no contact" with E. *See id.* Strogatz wrote: "Although not a star, [E] meets our standards." App. at 4438. The district court points to no criticism of E's legal analysis because there is none in the record and, in fact, E's ability was often rated as distinguished. *See, e.g.*, App. at 4417 (Glyn) ("His analytic abilities are exceptional."); *id.* at 4414 (Kamens) ("[E] exhibits a willingness to understand certain legal problems and analyzes them quite well."). The district court's reliance on Strogatz's evaluation in finding pretext further demonstrates the inconsistency with which it compared evaluations in this case, relying only on positive evaluations by partners Ezold had done "substantial" work for, while relying on negative evaluations of male associates based on no contact.

The following findings of the district court concerning Associate F, an associate in the corporate department, related to his legal analytical ability:

> 103. The grid on Associate F's bottom line memo in 1988, the year before his consideration for partnership, reflected a composite grade of "G-" for legal analysis.
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> . . . . .
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> 107. The prior year Donald Joseph, a partner in the Litigation Department, had rated Associate F's legal skills as acceptable, noting "a shoddiness in clear thinking or maybe lack of full experience."
>
> 108. At the same time, Michael Temin, a partner in the Corporate Department, recommended that Associate F receive help in his writing and drafting skills.
>
> . . . . .
>
> 110. In 1986, William Rosoff evaluated Associate F:
>
> > [H]e is sometimes too fast or flip or not attentive enough. In one matter, he failed to collect on a letter of credit on the grounds that he supposed Al Braslow would handle that part of the matter, when it was an inappropriate assumption to make especially without talking to Al. In another matter, the time for answering a complaint expired. While he might have thought someone else was seeing to it, he should have double checked.

Ezold I, 751 F.Supp. at 1186-87.

In fact, Joseph's full comment about "a shoddiness in clear thinking" stated:

> Acceptable-I have used ... [acceptable] in the old [Wolf, Block] terms; a good lawyer, practical and valuable. I can't describe precisely my hesitancy-perhaps a shoddiness in clear thinking or maybe lack of full experience....

App. at 4606. In F's final evaluation period, Joseph recommended F's admission "with favor." *Id.* at 4611. While Temin wrote that F needed help with writing skills in 1988, he gave him a grade of "good" in legal and professional skills. With respect to Rosoff's 1986 criticism, the district court omitted the following statement by Rosoff in the same evaluation: "[F] seems to be fine substantively.... I don't cite these as experiences which mean he cannot make the grade here, but he does ***537** have to make a more careful and expansive view of his role and responsibilities." *Id.* at 4602. Associate F's legal analytical ability was never called into question. In addition, F received a "distinguished," numerous "goods," and no "marginals" on his final review. Five partners viewed his admission to the partnership "with

enthusiasm," twenty-two "with favor," four "with mixed emotions" and three "with negative feelings." While the number of negative votes is close to the four Ezold received, the record shows that F had greater overall support from the partners in his department than Ezold did in hers.30

The district court cited the following comments regarding the legal analytical ability of Associate G, an associate in the corporate department admitted to the partnership in February 1988:

> 112. In the bottom line memorandum on Associate G for 1987, the year before he became partner in the Corporate Department, his grid reflected no composite score higher than "G." In four of the legal skills, including legal research and promptness, Associate G was rated only "acceptable."
>
> 113. In his 1987 evaluation Associate G was rated "acceptable" in legal analysis by Alan Molod, a partner in the Corporate Department. Mr. Molod added that Associate G was "Not a Star" and was "Sloppy at times and [showed] occasional lapses in judgment."

Ezold I, 751 F.Supp. at 1187.

The district court did not credit or consider the many favorable evaluations of G, such as, "[G] is one of the brightest lawyers in our firm." App. at 4676. While Molod rated G as only acceptable in legal analysis in 1987, this score should be viewed against the many "good" and "distinguished" grades he received in this category. Molod's full comments stated: "Good solid lawyer. Not a star. Very hard worker. Sloppy at times and occasional lapses in judgment." *Id.* at 4677. Despite rating G as only "acceptable" in legal analysis in 1987, Molod recommended G's admission to the partnership "with favor." Overall, thirteen partners viewed G's admission to the partnership "with enthusiasm," thirty "with favor," six "with mixed emotions" and two "with negative feelings."

The district court relied on one partner's criticisms of Associate H in concluding that Wolf applied its standards in a more severe fashion to Ezold. It found:

> 116. Mr. Arbittier wrote in his 1987 evaluation of Associate H:
>
> > [Associate H] has really let me down in his handling of a case for General Electric Pension Trust. He missed the crux of the case in the beginning and dragged his feet terribly in getting it back on track.... [Associate H] works very hard, but hard work alone is not enough. I have my doubts that he will ever be anything but a helper who does what he is told adequately but with no spark.
>
> Mr. Arbittier wrote that Associate H was trying "to change my view of him and I am giving him a second chance. He [has] brains. Maybe he can change." Mr. Arbittier also called Associate H "phlegmatic, diffident, nonassertive and unimaginative," and in 1988 wrote that he was "[not] real strong in legal analysis or in focusing on the key issues (dividing the wheat from the chaff)."
>
> 117. In 1989, Mr. Arbittier concluded that Associate H was a "nice guy" who had made improvement; he supported Associate H for partnership. Mr. Arbittier explained Associate H's "redemption"; Associate H told Mr. Arbittier how he had been overworked.

Ezold I, 751 F.Supp. at 1187.

While the district court credited Arbittier's criticism of H, it chose to ignore Arbittier's continuing criticism of Ezold on the same grounds between 1984 and 1988. *See supra* at 516-17, 518-19. The district court also ignored the fact that in H's final two evaluations, Arbittier viewed his admission to the partnership with favor and wrote the following comments: "[s]ignificant ***538** improvement"; "A good lawyer.... In the past I had some problems with [H]. He seems to have overcome them...." App. at 4845, 4858. This change in viewpoint was based on H's handling of a specific case for Arbittier. Goldberger specifically wrote in his evaluation of H that Arbittier's critical evaluation was "aberrational ... [H] is a talented, hard-working lawyer who deserves to make it." *Id.* at 4828. Moreover, the district court failed to acknowledge H's grades of "distinguished" in legal analysis throughout his tenure at the firm. Twelve partners viewed his admission to the partnership "with enthusiasm," seventeen "with favor," one "with mixed emotions" and zero "with negative feelings."

Finally, we note that three of the four partners who expressed "negative feelings" towards Ezold's candidacy were members of her own department, while none of the eight male associates was viewed with "negative feelings" by more than one member of their department.

The district court's finding that Wolf applied its partnership standards in a more "severe" fashion to female associates is clearly erroneous. The comparative evidence of more favorable treatment for male employees contained in this record does not support that finding. *See Bellissimo*, 764 F.2d at 180 (holding pretext "clearly erroneous because [plaintiff] failed to make any showing of disparate treatment and because [defendant] proved that male attorneys were treated the same as she in the disputed areas."). Our review of the entire evaluation files of the

eight male associates discloses that, unlike Ezold, whose staunchest supporters persistently expressed doubts about her ability to meet the firm's criterion of legal analysis, Associates A to H faced no comparable degree of criticism about their legal analytical skills. The snippets of comments critical of these male associates culled from dozens of evaluation forms do not show that Wolf's articulated reason for declining to recommend Ezold for partnership was "obviously weak or implausible" or that the standards were "manifestly unequally applied." *Villanueva*, 930 F.2d at 131 (citations omitted).

B.

Despite Wolf's request, the district court failed to make findings concerning other male associates who, like Ezold, were passed over for partnership. The evidence concerning their evaluations adds support to our conclusion that the district court's finding that Wolf's asserted legitimate reason for denying Ezold a partnership position was a sham cannot be supported on a theory of discriminatory application.

[11] Male Associates 1 and 2, who were comparable to Ezold in the category of legal analysis, were also rejected for regular partnership. Again, we recognize that the district court, as factfinder, "can accept some parts of a party's evidence and reject others." *Bennun*, 941 F.2d at 179. But when the evidence sheds light on whether the employer treated similarly situated males and females alike, it should not be ignored. *See Bellissimo*, 764 F.2d at 181 (comparison of whether male attorneys treated same as discharged female attorney in disputed categories).

Male Associates 1 and 2 were highly rated by a number of partners, but, as with Ezold, the Associates Committee determined their ability in legal analysis fell below the firm's standards. The Associates Committee expressed its views on Male Associates 1 and 2 in a letter to the Executive Committee stating that, although they were "valuable associates," they nevertheless fell below the firm's "historically accepted standards for admission to the partnership." App. at 2586. The partners' comments about Male Associates 1 and 2 were very similar to those criticizing Ezold. This is illustrated by the following sampling of comments about Male Associate 1: "[He] has good talents although he is not as capable in legal analysis as others," *id.* at 4632 (Brantz); "[His] best skills are in client relations and desire to please, rather than legal analysis or intellectual genius," *id.* at 4630 (Schneider); "[H]e has great difficulty analyzing and drafting complex business transactions," ***539** *id.* at 4642 (Wiener); "[There are] questions about his intellectual strength, his ability to manage complex transactions and his level of attention to detail," *id.* at 5044 (Baer). The partners' comments with regard to Male Associate 2 are also similar to those the partners made about Ezold: "[H]e lacks the minimum level of analytic ability which is required to succeed at WB," *id.* at 4696 (Chanin); "[His legal analysis is] just fair. Came up with little in the way of new ideas.... Seemed to miss key points at times," *id.* at 4695 (Arbittier); "[Legal analysis is] [n]ot penetrating or focused. I do not feel comfortable relying on his legal judgment," *id.* at 4697 (Arbittier); "[H]e just doesn't have the high level of intelligence we need to handle complex legal questions," *id.* at 4696 (Arbittier); "[He] is an enigma to me. His writing ability is substandard, and I have no confidence in his analytic skill. On the other hand, my client [ ] likes him very much," *id.* at 4725 (Brantz).

If the district court had employed the appropriate comparative analysis by focusing on whether Wolf's articulated reason of legal analysis was a pretext, it should have reached a different result. Our review of the whole record leaves us with a "definite and firm conviction that a mistake has been committed" by the district court in its comparative analysis. *United States Gypsum Co.*, 333 U.S. at 395, 68 S.Ct. at 542. The record does not show that Wolf applied its partnership admission standards unequally to male and female associates, nor that diminished ability in the area of legal analysis was an improper reason for denying admission.31 We sympathize with Ezold's situation and the long hours and efforts she put toward her partnership goal. On the record before us, however, we cannot affirm the district court's finding that Wolf's asserted reason for denying Ezold's admission to the partnership was unworthy of credence based on her theory that its standard of legal analytic ability was applied to her in an unlawfully discriminatory manner.

Because the evaluation files contain insufficient evidence to show that Ezold was evaluated more severely than the male associates, Ezold has not shown that Wolf's proffered reason for failing to promote her was "unworthy of credence." We therefore hold that the district court's ultimate finding of pretext cannot be sustained on this basis.

IX.

We must, however, still consider certain additional evidence which Ezold says directly establishes that Wolf's articulated reason was a pretext by showing that a discriminatory reason more likely motivated its decision not to admit her to the partnership.

As stated at the outset of our pretext analysis, sufficiently strong evidence of an employer's past treatment of a plaintiff may prove pretext. *See Patterson,* 491 U.S. at 188, 109 S.Ct. at 2378; *McDonnell Douglas,* 411 U.S. at 804, 93 S.Ct. at 1825. An employer's general policy and practice with regard to minority employment may also establish pretext. *McDonnell Douglas,* 411 U.S. at 804-05, 93 S.Ct. at 1825. The district court held that four instances of conduct "supported" the finding of pretext that it otherwise based on its comparison of Ezold with Associates A-H. The four instances of conduct by Wolf that the district court held supported its finding of pretext were: (1) Ezold was evaluated negatively for being too involved with women's issues in the firm; (2) a male associate's sexual harassment of female employees at the firm was seen as "insignificant"; (3) Ezold was evaluated negatively for being very demanding while male associates were evaluated negatively for lacking assertiveness; ***540** and (4) Ezold "was the target of several comments demonstrating [Wolf's] differential treatment of her because she is a woman." *Ezold I,* 751 F.Supp. at 1192 (COL 12). They are discussed in Part IX C. *infra.* In addition, it made findings of fact concerning Wolf's assignment process that Ezold claims support its finding of pretext. We discuss that contention in Part IX A. Ezold's contention that the ratio of male to female partners at Wolf shows a pattern of illegal discrimination is the subject of Part IX B. Finally, Ezold points to other evidence in the record, upon which the district court made no findings, as evidence that shows Wolf's asserted reason for passing her over was pretextual. She contends that this evidence, considered as a whole, would entitle the district court to find that Wolf "more likely" denied her admission to the partnership because of her sex than because of Wolf's asserted legitimate non-discriminatory reason. *See Burdine,* 450 U.S. at 256, 101 S.Ct. at 1095. That evidence is the subject of discussion in Part IX D.

In order to succeed on this theory, Ezold must show that it is more likely that the firm denied her a partnership position because of her sex than because of its perceptions of her legal analytic ability. With this causal requirement in mind, we will analyze each of the incidents or practices at Wolf which Ezold alleges shows directly that Wolf passed her over because she is a woman rather than because of any deficiency Wolf might have perceived in her legal ability.

A.

[12] Ezold contends illegal discriminatory treatment based on sex deprived her of equal opportunities to work on significant cases or with a wide variety of partners and that this unequal treatment is evidence of gender discrimination. From 1983 to 1987, Kurland was responsible for the assignment of work to associates in the litigation department. He often delegated this responsibility to Arbittier. Though Ezold acknowledges that many partners bypassed the formal assignment procedure and directly assigned matters to associates, the district court found that Arbittier assigned Ezold to actions that were "small" by Wolf standards. *Ezold I,* 751 F.Supp. at 1178 (FOF 24).[32] Ezold complained to Kurland and others about the quality of her assignments and that she had opportunities to work only with a limited number of partners.

This Court has recognized that when an employer discriminatorily denies training and support, the employer may not then disfavor the plaintiff because her performance is affected by the lack of opportunity. *Jackson v. University of Pittsburgh,* 826 F.2d 230, 235 (3d Cir.1987), *cert. denied,* 484 U.S. 1020, 108 S.Ct. 732, 98 L.Ed.2d 680 (1988); *EEOC v. Hay Assocs.,* 545 F.Supp. 1064, 1072 (E.D.Pa.1982). Even if we assume that Ezold received "small" cases at the beginning of her tenure at Wolf, however, there is no evidence this was the result of sex discrimination. Her evaluations indicate, rather, that it may have been her academic credentials that contributed to her receipt of less complex assignments. For example, Davis stated that "[t]he Home Unity case was the first really fair test for Nancy. I believe that her background relegated her to ... matters (where she got virtually no testing by Wolf, Block standards) and small matters." App. at 3514. It is undisputed that Arbittier opposed hiring Ezold because of her academic history and lack of law review experience. In one of Ezold's early evaluations, Kurland wrote: "She has not, in my view, been getting sufficiently difficult matters to handle because she is not the Harvard Law Review type.... We must make an effort to give her more difficult matters to handle." *Id.* at 3400. He also stated: "I envisioned ... her when I hired her as a 'good, stand-up, effective courtroom lawyer.' " *Id.* at 3348. In urging the Executive Committee to reconsider Ezold's candidacy Magarity wrote:

> ***541** [The] perception [that she is not able to handle complex cases] appears to be a product of how Sy Kurland viewed Nancy's role when she was initially hired. For the first few years Sy would only assign Nancy to non-complex matters, yet, at evaluation time, Sy, and some other partners, would qualify their evaluations by saying that Nancy does not work on complex matters. Nancy was literally trapped in a Catch 22. The Chairman of the Litigation Department would not assign her to complex cases,

> yet she received negative evaluations for not working on complex matters.

Id. at 5576-77.[33]

While it would be unfortunate if these academic and intellectual biases were perpetuated after the decision was made to hire Ezold, academic or intellectual bias is not evidence of sex discrimination. The district court made no finding that Ezold was given small assignments because of her sex. In fact, its findings contradict unlawful discrimination in that respect. It found:

> She worked for partners in the Litigation Department on criminal matters, insurance cases, general commercial litigation and other areas, and also did work for some partners in other departments. She handled matters at all stages of litigation, and was called upon by partners to go to court on an emergency basis.

Ezold I, 751 F.Supp. at 1178 (FOF 22). At trial Ezold characterized many of the cases she worked on as "complex" by either her standards or Wolf standards. In advocating Ezold for partner, Magarity stated that "from 1986 through the present, Nancy has worked on numerous significant complex cases." App. at 5577.

The district court found that when Ezold suggested to Schwartz in her early years at Wolf that an unfairness in case assignments may have occurred because she was a woman, Schwartz replied: "Nancy, don't say that around here. They don't want to hear it. Just do your job and do well." *Ezold I,* 751 F.Supp. at 1188 (FOF 127); App. at 657. This statement, made years before the 1988 decision to deny Ezold partnership, does not show that Wolf's evaluation of her legal ability was pretextual. Ezold's testimony that she "didn't know of any other reason" than gender for Wolf's treatment of her in the assignment process adds little.

Ezold also points to a preliminary injunction matter early in her career that was reassigned to a man after she had been the sole volunteer. The district court found that Arbittier reassigned the injunction to a man "without explanation." *See* 751 F.Supp. at 1178 (FOF 29). Arbittier, however, testified that he realized the case needed a more senior associate and so reassigned it. This too occurred early in Ezold's employment at Wolf and there is nothing in the record to show that it had any connection with Ezold's failure to attain partnership. The district court's finding does not support a conclusion that Wolf's reason for denying Ezold admission to the partnership is pretextual.

The district court also found that when Ezold first got to the firm in 1983, she and a male associate not on partnership track were assigned to sort out a large group of minor cases previously handled by an associate who had left the firm. This finding fails to support the district court's ultimate finding of pretext. The assignment was made on an as-needed basis to fill the void created when the associate working on the matters had left. Additionally, the district court failed to recognize that Arbittier gave Ezold full authority to reassign the matters to other male associates and administer the whole affair. The small bankruptcy matters to which the district court refers were later reassigned by Kurland at Ezold's request. Kurland testified that he did this "both to free Nancy up a little and to give some demonstration that we [were] making an effort to change the nature of her assignments." App. at 3375.

***542** Concerns about associates being exposed only to "small" matters were not unique to Ezold. In fact, numerous partners expressed similar concerns about exposure to partners and assignment to complex cases with respect to male Associates A and B. *See* App. at 4920 ("The Department should try to give A some assignments as second man on a large case.... If we fail to do this, [A] will continue to slip along operating independently on cases and we will have to confront, too late, the question of whether or not he meets partnership standards."); *id.* at 4324 ("[A] has not been tested on large matters because of early perceptions that he was cavalier."); *id.* at 4928 (B must get broader exposure); *id.* at 4926 ("somehow [B] must get broader exposure-even his Dep't. Chairman knows nothing about him."). Ezold's assignment to a disproportionate number of small matters may have reflected academic or intellectual bias. Beyond her own perceptions, however, Ezold offered no evidence showing that she was treated differently from male associates in getting assignments or exposure. The findings of the district court concerning Wolf's assignment process are in fact gender-neutral and do not support its ultimate finding of pretext.

With respect to the district court's finding that the firm prevented Ezold from gaining wide exposure to partners, the record shows that sixty-five partners expressed "no opinion" on the admission of Associate B, a litigator, which was more than the fifty-nine "no opinion" votes Ezold received. Fifty-nine partners also expressed "no opinion" on the admission of Associate H.

The district court's finding that Ezold did not work for more than five hundred hours in any year on any one matter, while "virtually all the male associates in the department" worked for six hundred hours on a single matter, is belied by the record. *Ezold I,* 751 F.Supp. at 1178

(FOF 27). The record shows that Ezold billed 701.2 hours on a major litigation matter in 1985 and that a majority of male associates in the litigation department did not bill six hundred hours or more on any single matter.

Finally, the district court found that by allowing partners to bypass the formal assignment system, Kurland and Arbittier "prevented the plaintiff from securing improved assignments ... [and] impaired her opportunity to be fairly evaluated for partnership." *Ezold I,* 751 F.Supp. at 1179 (FOF 38, 40). The fact that Wolf's formal assignment process was often bypassed does not support the district court's finding of pretext.[34] Title VII requires employers to avoid certain prohibited types of invidious discrimination, including sex discrimination. It does not require employers to treat all employees fairly, closely monitor their progress and insure them every opportunity for advancement. "[O]ur task is not to assess the overall fairness of [Wolf's] actions." *Logue,* 837 F.2d at 155 n. 5. It is a sad fact of life in the working world that employees of ability are sometimes overlooked for promotion. Large law firms are not immune from unfairness in this imperfect world. The law limits its protection against that unfairness to cases of invidious illegal discrimination. This record contains no evidence that Wolf's assignment process was tainted by a discriminatory motive.

B.

Ezold also tries to reinforce her claim of pretext by pointing to the small number of women admitted to the partnership throughout the firm's history. The record shows that in 1989, only five of Wolf's 107 partners were women and there was only one woman among the twenty-eight partners in the litigation department in which Ezold had sought partnership. The district court made no finding based upon these numbers.[35]

[13] [14] Statistical evidence of an employer's pattern and practice with respect to minority employment may be relevant to a showing of pretext. *See McDonnell Douglas,* 411 U.S. at 805, 93 S.Ct. at 1825. ***543** Ezold's raw numerical comparisons, however, are not accompanied by any analysis of either the qualified applicant pool or the flow of qualified candidates over a relevant time period. The district court in *Hopkins* recognized the weakness of this type of evidence:

> [Plaintiff's] proof lacked sufficient data on the number of qualified women available for partnership and failed to take into account that the present pool of partners have been selected over a long span of years during which the pool of available qualified women has changed. Women have only recently entered the accounting and related fields in large numbers and there is evidence that many potential women partners were hired away from Price Waterhouse by clients and rival accounting firms.

Hopkins, 618 F.Supp. at 1116; *cf. Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 650-51, 109 S.Ct. 2115, 2121, 104 L.Ed.2d 733 (1989) (in disparate impact case, proper comparison is between racial composition of at-issue jobs and racial composition of qualified population in relevant job market).

Because no conclusion can be drawn from Ezold's raw numbers on underrepresentation, they are not probative of Wolf's alleged discriminatory motive. *See Villanueva,* 930 F.2d at 131 (statistics showing small percentage of minority faculty members inadequate absent some other indication of relevance); *Molthan,* 778 F.2d at 963 ("Because the considerations affecting promotion decisions may differ greatly from one department to another, statistical evidence of a general underrepresentation of women in the position of full professor adds little to a disparate treatment claim"). We, like the district court, do not consider them material to Ezold's Title VII claim.

C.

Finally, the district court held that the four specific instances of conduct mentioned *supra* at 540 evidenced a discriminatory animus and supported its finding of pretext. *See Ezold I,* 751 F.Supp. at 1192 (COL 12). It did not hold that these instances of conduct provided an independent or alternative basis for its finding, but viewed them only as support therefor.

1.

[15] The first instance of conduct on which the district court relied was that Ezold "was evaluated negatively for being too involved with women's issues ... specifically her concern about the [firm's] treatment of paralegals," while Fiebach was not reproached for raising the "women's issue" of part-time employment. *Id.* Ezold's perception was that the firm mistreated its paralegals by overworking and underpaying them and that treatment would not have occurred but for the fact that they were predominantly women. The court's finding on this matter refers to a 1986

evaluation submitted by Schwartz, one of Ezold's partnership supporters, in which he wrote: "Judgment is better, although it still can be clouded by over-sensitivity to what she misperceives as 'womens' [sic] issues." App. at 3366. Schwartz testified, however, that he was not criticizing Ezold for raising the issue of the firm's treatment of paralegals, but for her misperception that this was a "women's issue." *Id.* at 1585-86. Moreover, the fact that Fiebach, a male partner, was not criticized for encouraging discussion of part-time employment is not probative of whether the partnership decision concerning Ezold was gender-based. This evidence is of marginal value in supporting the district court's finding of pretext.

2.

[16] The second instance of conduct on which the district court relied was "the fact that a male associate['s] sexual harassment of female employees at the Firm was seen as insignificant and not worthy of mention to the Associates Committee in its consideration of that male associate for partnership." *Ezold I*, 751 F.Supp. at 1192 (COL 12). While it is undisputed that the male associate, Associate X, engaged in some form of harassment of female employees, the district court's finding about Wolf's attitude towards it is unsupported by the ***544** evidence and thus clearly erroneous. The record shows that Strogatz, then Chairman of the Associates Committee, met with Associate X concerning these incidents, and that a memorandum was placed in his personnel file. There was testimony that the incident was reported to the associate's department chairman and to the Associates Committee. The record also indicates that the incident occurred after the Associates Committee decided it was unlikely to recommend Associate X for partnership in any event. There is no evidence Wolf viewed the incident as "insignificant." This incident is not evidence that the firm harbored a discriminatory animus against either women generally or Ezold specifically. It lends no support to the district court's finding of pretext.

3.

[17] The district court found that Ezold was "evaluated negatively for being 'very demanding,' while several male associates who were made partners were evaluated negatively for *lacking* sufficient assertiveness in their demeanors." *Ezold I*, 751 F.Supp. at 1192 (COL 12) (emphasis in original). The criticisms of Ezold's assertiveness related to the way in which she handled administrative matters such as office and secretarial space, and not legal matters. *See* App. at 2206-11 ("Very difficult to deal with on administrative matters. Very demanding."); *see also id.* at 3365, 3389. In particular, David Hofstein's evaluation of Ezold in 1984 stated:

> My one negative experience did not involve legal work. When my group moved to the south end of the 21st floor, Nancy had a fit because she had to move. As I. Strogatz and our [Office Manager] know, Nancy's behavior was inappropriate and I think affected everyone's perception of her. Dealing with administrative matters professionally is almost as important as dealing with legal matters competently, and at least in that instance, Nancy blew it.

App. at 3393.
The district court refers to criticisms of male associates for lacking assertiveness, but in connection with their handling of legal matters. The district court was comparing apples and oranges. The record shows that male associates were also criticized for their improper handling of administrative problems. *See* App. at 3388 ("He has had a series of run ins with administration...."); *id.* at 5099 (associate not admitted to partnership criticized for "lack of tact, being arrogant or undiplomatic or unconciliatory"); *id.* at 4778 ("[h]e is quarrelsome"). The district court also quotes an evaluation of Ezold as a "prima donna" on administrative matters, but leaves out the full context of the statement which compares her to a male associate: "Reminds me of [a male associate]-very demanding, prima donna-ish, not a team player." *Id.* at 3209.[36]

The district court's finding that this evidence supports its conclusion that Ezold was treated differently because of her gender is clearly erroneous. An "unfortunate and destructive conflict of personalities does not establish sexual discrimination." *Bellissimo*, 764 F.2d 175, 182 (3d Cir.1985). Further, by the time of Ezold's final evaluation in 1988, there was no mention of her attitude on administrative matters. Rosoff testified that in independently reviewing the Associate Committee's decision not to recommend Ezold for partnership, he disregarded the criticisms of her handling of administrative matters from earlier years as "ancient history." App. at 2410. There is again no evidence that this incident ***545** played any role in Wolf's decision to deny Ezold's admission to the partnership.

4.

[18] Finally, the district court found that Ezold was the target of several comments demonstrating the firm's differential treatment of women. The district court found the following:

> During the selection process ... Mr. Kurland told Ms. Ezold that it would not be easy for her at Wolf, Block because she did not fit the Wolf, Block mold since she was a woman, had not attended an Ivy League law school, and had not been on law review. Mr. Kurland and Ms. Ezold stated that at one of the meetings with Ms. Ezold, only Ms. Ezold and he were present.

See Ezold I, 751 F.Supp. at 1177 (FOF 18). Ezold did not raise this reference at a subsequent lunch with associate Liebenberg, a woman, and Schwartz, nor did she express concern over Wolf's treatment of women. Although Kurland denied making the statement, the district court resolved this credibility issue in Ezold's favor and we will not disturb it.

Wolf argues that this comment made in 1983 before Ezold accepted the job is not probative on whether its partnership decision five years later was gender-based. In *Roebuck v. Drexel University,* 852 F.2d at 733, the plaintiff alleged racial discrimination in the denial of tenure and we considered the probative value of evidence of a discriminatory attitude on the part of a key decisionmaker. There, the president of the university exercised a significant influence on the decisionmakers and had made the final tenure decision. He had also made two statements reflecting racial bias. *Id.* We held, although the "statements standing alone, occurring as they did over five years before the final denial of tenure, could not suffice to uphold a finding [of discrimination], they do add support, in combination with the other evidence, to the ultimate conclusion." *Id.; see Jackson v. Harvard Univ.,* 721 F.Supp. 1397, 1431 n. 24 (D.Mass.1989) (alleged derogatory comments made to plaintiff by dean before she began teaching "were made well before the plaintiff's tenure review process began and are manifestly too remote from the tenure decision-making process to have any relevance in this action"), *aff'd,* 900 F.2d 464 (1st Cir.), *cert. denied,* 498 U.S. 848, 111 S.Ct. 137, 112 L.Ed.2d 104 (1990). Here, however, as we have painstakingly pointed out, other evidence of sex discrimination is lacking. In any event, Kurland made this comment before Ezold began her employment at Wolf, five years before the partnership decision. The comment's temporal distance from the decision Ezold says was discriminatory convinces us it is too remote and isolated to show independently that unlawful discrimination, rather than Wolf's asserted reason, more likely caused the firm to deny Ezold the partnership she sought in 1988.

Kurland himself had left the firm in January 1988, before Ezold's 1988 evaluation and before the Associates Committee and the Executive Committee denied her admission to the partnership. Thus, he did not take part in the final decision to deny Ezold's admission to the partnership, although he had consistently supported her candidacy despite his recognition of other partners' perceptions about her legal analytical ability. *See Ezold I,* 751 F.Supp. at 1182 (FOF 62) ("I think she has proven her case."). Stray remarks by non-decisionmakers or by decisionmakers unrelated to the decision process are rarely given great weight, particularly if they were made temporally remote from the date of decision. *See Hopkins,* 490 U.S. at 277, 109 S.Ct. at 1804 (O'Connor, J., concurring); *Frieze,* 950 F.2d at 541; *Guthrie v. Tifco Indus.,* 941 F.2d 374, 378-79 (5th Cir.1991), *cert. denied,* 503 U.S. 908, 112 S.Ct. 1267, 117 L.Ed.2d 495 (1992). We decline to depart from this principle in the present case.

D.

[19] In her brief on appeal, Ezold points to several other alleged sexist comments by Kurland to which she testified at trial but upon which the district court made no findings. Thus, the remaining issue on sufficiency is whether all of the sexist comments ***546** Ezold attributes to Kurland, taken together, are enough to establish pretext. Ezold testified that at the close of a litigation department dinner, Kurland singled her out for interrogation on the issue of sex discrimination at the firm. Kurland testified that he addressed the topic to the entire group because he was Vice Chancellor of the Philadelphia Bar Association and everyone was discussing the issue at the time. Ezold also testified and Kurland did not deny that Kurland would give her instructions in the hallway to "smile" and crudely ask whether she had any romantic encounters the night before. She also testified that at a litigation associates' breakfast Kurland recounted a judge's comments about a murder case involving the rape of a corpse. Kurland testified:

> I looked around at the young people and at the time I was in the middle of a murder trial and I thought, my God, my young people here, have such a narrow fragmented aspect of what law is today, interrogatories and depositions in Federal Court, dealing in money matters and they don't really have a comprehension of what happens in law, that we have a whole state court system

> and criminal system, that they do not even come in contact with and I thought it would be beneficial for them to broaden their horizon to give them some exposure to hear firsthand from me what it was like to be involved in an actual murder trial ... [and that] the judge was telling me about other cases he had ... and he told me about this one case and I talked about a case that a man had killed a woman and had sex with her afterwards.

App. at 1756-57.

Ezold additionally testified that Kurland told her not to refer a talented female attorney to the firm for employment because he did not want the problems caused by another female attorney working in the litigation department. Kurland did not recall Ezold talking to him about hiring anyone but denied making the statement about women associates. Finally, Ezold points to an alleged statement by Kurland cautioning female attorneys with children from traveling on business. Kurland denied making this statement and in fact often assigned Liebenberg, a female partner who had small children, to cases requiring extensive travel.

Although the district court made no findings that these statements were actually made or whose version of the facts it believed, we must consider them on the sufficiency issue in the light most favorable to Ezold. In doing so, we recognize that proof of a discriminatory atmosphere may be relevant in proving pretext since such evidence "does tend to add 'color' to the employer's decisionmaking processes and to the influences behind the actions taken with respect to the individual plaintiff." *Conway v. Electro Switch Corp.*, 825 F.2d 593, 597 (1st Cir.1987). We must therefore decide whether these six alleged comments by Kurland over a period of five years are sufficient to sustain the district court's finding that Wolf's reason for denying Ezold admission to the partnership-her legal analytical ability-was just a pretext to cover up sex discrimination.

In *Lockhart v. Westinghouse Credit Corp.*, we considered the relevance in an age discrimination case of a statement made by a corporate vice-president after the plaintiff's termination. The vice-president stated: "[This company] was a seniority driven company with old management and that's going to change, 'I'm going to change that.' " 879 F.2d at 54. We said:

> When a major company executive speaks, "everybody listens" in the corporate hierarchy, and when an executive's comments prove to be disadvantageous to a company's subsequent litigation posture, it can not compartmentalize this executive as if he had nothing more to do with company policy than the janitor or watchman.

Id. This case is superficially similar to *Lockhart* in that Kurland, as the chairman of the litigation department, was a company executive until he left the firm in 1987. It is distinguishable, however, in several material respects. The other evidence supporting the verdict in favor of the plaintiffs in *Lockhart,* unlike the evidence in the ***547** present case, was substantial.[37] In addition, though Kurland was at one time a decisionmaker and eventually supported Ezold's admission to the partnership, he took no part in the final votes or evaluations concerning Ezold because he had by that time left the firm.

Though Kurland's comments, if made, were crude and unprofessional, we do not believe they are sufficient in and of themselves to sustain the district court's judgment in favor of Ezold. They may reflect unfavorably on Kurland's personality or his views, but they are not sufficient to show that there was such a pervasive hostility toward women at Wolf sufficient to show that Ezold's partnership decision was more likely the result of discriminatory bias than Wolf's perception[38] of Ezold's legal ability. Ezold has made no claim that Kurland's comments created a hostile working environment. *See Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 64, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986).[39] If we were to hold that several stray remarks by a nondecisionmaker over a period of five years, while inappropriate, were sufficient to prove that Wolf's associate evaluation and partnership admission process were so infected with discriminatory bias that such bias more likely motivated Wolf's promotion decision than its articulated legitimate reason, we would spill across the limits of Title VII. *See Hopkins,* 490 U.S. at 239, 109 S.Ct. at 1785 (Title VII strikes a balance between protecting employees from unlawful discrimination and preserving for employers their remaining freedom of choice.).

X.

We have reviewed the evidence carefully and hold that it is insufficient to show pretext. Despite Ezold's disagreement with the firm's evaluations of her abilities, and her perception that she was treated unfairly, there is no evidence of sex discrimination here. The district court's finding that Wolf's legitimate non-discriminatory reason was incredible because Ezold was evaluated more severely than male associates because of her gender, as well as its

finding that Wolf's requirement that she possess analytical skills sufficient to handle complex litigation was a pretext for discrimination, are clearly erroneous and find no support in the evidence. Finally, this record also lacks sufficient evidence of discriminatory animus to sustain a finding that Wolf more likely had a discriminatory ***548** motive in denying Ezold's admission to the partnership.

XI.

Accordingly, we will reverse the judgment of the district court in favor of Ezold and remand for entry of judgment in favor of Wolf.

SUR PETITION FOR REHEARING

Feb. 3, 1993

PRESENT: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and SEITZ,* Circuit Judges.

The petition for rehearing filed by Nancy O'Mara Ezold in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Parallel Citations

60 Fair Empl.Prac.Cas. (BNA) 849, 61 Fair Empl.Prac.Cas. (BNA) 1000, 60 Empl. Prac. Dec. P 41,921, 61 USLW 2398

Footnotes

1 *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), involved an accounting firm's denial of partnership to a female accountant. That case did proceed to trial but the appellate decisions provide guidance only on the parties' burdens of proof in a mixed motives case. This case was not tried on that theory.

2 The district court's order also stated that if its prior orders were affirmed on appeal, it would thereafter determine back pay for the period from February 1, 1991 to the date of Ezold's instatement as a partner.

3 There was little change beyond format in the evaluation forms used throughout Ezold's tenure. We will describe the evaluation forms in effect in 1987 and 1988, the years Ezold was a senior associate being evaluated for admission to the partnership.

4 At all relevant times, Strogatz served as chairman of the Associates Committee.

5 The evaluation form asks the reviewing partner whether he or she would like to "supplement and/or explain [the] written evaluation in an oral interview with a member of the Associates Committee." *See, e.g.*, App. at 3889, 6467.

6 The district court quoted Ezold's evaluations in FOF 61-71.

7 Because the reason Wolf articulated for denying Ezold partnership was lack of legal analytic ability, this summary includes neither positive evaluations in other categories upon which the district court made findings nor evaluations in which there was neither grade nor comment in the category of legal analysis. Many of Ezold's evaluations in other categories were highly complimentary and compared quite favorably to the partners' evaluations of male candidates for partnership in the same categories. The district court's use of these other favorable evaluations in the comparative analysis in support of its ultimate finding of pretext is discussed in Part VII of this opinion, *infra*.

1987 Evaluations

Partner Name	***Grade (Legal Analysis)***	**Comm**

		e n ts
Promislo	M	"I had minimal contact with Nancy, but I thought she did not generate ideas ... or pull the facts together well and exercise the best lawyerly judgement. She seemed somewhat over her head, but I don't think she should have been." Recommended partnership with "negative feelings." *Id.* at 3854-57.
Kurland		"[T]here seems to be serious question as to whether she has the legal ability to take on large matters and handle them on her own. We have been over this many times and there is nothing I can add to what I've already said about Nancy. What I envisioned about her when I hired her as a "good, stand-up effective courtroom lawyer" remains to be true and I think she has proven her case. Apparently she has not proved to the satisfaction of the firm the other qualities considered necessary to rise to the top of the firm." Recommended partnership "with mixed emotions." *Id.* at 3878-81.[8]
Alderman	A	Slight contact. Recommended partnership with "negative feelings." *Id.* at 3886-89.
Boote	A	"Nancy has avoided demonstrating ability in th[e] area [of legal analysis] because I believe she lacks it. On the other hand, in Nancy's case, other qualities redeem her.... I would not want her in charge of a large legally complex case, the traditional measure of a Wolf Block partner." Recommended partnership "with favor." *Id.* at 3894-97.[9]
Flaherty	A	Slight contact. Recommended partnership with "mixed emotions." *Id.* at 3918-21.
Joseph		"I have been singularly unimpressed with the level of her ability.... She may be fine to keep for certain smaller matters, but I don't see her skills as being those for our sophisticated practice." *Id.* at 3930-33. Recommended partnership with "negative feelings." *Id.* at 3933.
Schwartz	G	"She is excellent in court and loves to be in that arena.... She remains a little weak in her initial analysis of complex legal issues." *Id.* at 3954-56.[10]
Dubrow	A	"[I]n my one experience we lost a client, but I think Nancy performed satisfactorily." No opinion as to partnership admission. *Id.* at 3990-93.
Roberts	G	Slight contact. Recommended partnership "with favor." *Id.* at 4052-55.
Spitzer	G	"Little contact, most favorable impression." Recommended partnership "with favor." *Id.* at 4060-63.

8 FN8. The district court omitted from its findings this portion of Kurland's evaluation concerning Ezold's legal analytical ability.

9 FN9. The district court omitted this portion of Boote's evaluation from its finding.

10 FN10. The district court omitted this comment on legal analysis from its finding.

11 Roberta Liebenberg, a female litigation partner, voted against Ezold's admission. The only Associates Committee member voting in favor of Ezold was her former neighbor, Ronald Weiner.

12 "Special partners," in contrast to regular partners, do not have the right to vote, do not have any equity in the partnership and may be removed by the Executive Committee. In addition, the benefits provided are inferior to those of regular partners. *Ezold I*, 751 F.Supp. at 1177 (FOF 15).

13 It is not clear from the record whether such an inquiry is a matter of course in connection with negative partnership recommendations.

14 Ezold testified that Kopp told her that she could learn the area of the law in a week. Ezold contended that the offer of a position in domestic relations, a position with allegedly less esteem in the firm, is also evidence of discrimination. The district court found this department was formerly headed by a male, and is currently headed by two male senior partners. *Ezold I*, 751 F.Supp. at 1190 (FOF 143). We believe this abrogates the inference of discrimination Ezold would have us draw.

15 After the Associates Committee determined that it would not be recommending Ezold for partnership, it was decided not to give her the September 1988 raise given to those in her class who were promoted. Ezold's salary as a senior associate was $73,000.00. The lowest level regular partner earns between $125,000.00 and $140,000.00 a year.

16 This statement in *Patterson* is in conformity with the law that pre-existed *Patterson* and is not affected by the Civil Rights Act of 1991. *See Rush v. McDonald's Corp.*, 966 F.2d 1104, 1119-20 (7th Cir.1992) (section 101 of Civil Rights Act of 1991 overturns portion of *Patterson* holding that proscription of racial discrimination in making of contract under 42 U.S.C.A. § 1981 applies only to refusals to hire and promotions rising to level of opportunity for "new and distinct relation" between employer and employee) (quoting *Patterson*, 491 U.S. at 185, 109 S.Ct. at 2377)).

17 Though the record indicates that perceived legal analytic ability is a necessary condition for partnership at Wolf, it, in and of itself, is not a necessary and sufficient condition. Otherwise, the remaining categories on the evaluation form would be superfluous.

18 We recognize that the conclusions in the statement we quote from *Hopkins* were made by the factfinder. Nevertheless, we think the quoted language, correctly setting forth the basis on which comparison must be made, reflects the legal standard that the district court was required to apply to the evidence before it in Ezold's case.

19 Among the factors other than legal analytic ability that Wolf considered are "creativity," "negotiating and advocacy," "attitude," "ability under pressure" and "dedication." *See supra* at 515 (listing criteria of legal performance and personal characteristics appearing on evaluation form).

20 As discussed *infra*, the plaintiff can also prove that despite the employer's articulated reason, a discriminatory reason "more likely" motivated the employer's decision. *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095.

21 The defendant is not required to prove that those promoted are "better qualified" than the plaintiff. *See Burdine*, 450 U.S. at 258, 101 S.Ct. at 1096.

22 Ezold argues the district court appropriately declined to consider Fiebach's objections because they were gender-based. Ezold refers to an April 1988 disagreement over case strategy in the Carpenter case. The district court made a general finding that Ezold

> was criticized for being "very demanding" and was expected by some members of the Firm to be nonassertive and acquiescent to the predominantly male partnership. Her failure to accept this role was a factor which resulted in her not being promoted to partner.

Ezold I, 751 F.Supp. at 1189 (FOF 132). This general finding does not permit the court to ignore Fiebach's assessment. It does, however, illustrate again that the court did not consider the whole record relating to Wolf's articulated reason for denying Ezold a partnership position.

23 The record shows that Arbittier was a tough critic of many associates, male and female, when he felt they did not measure up to Wolf's standards on analytic ability.

24 The most damning motive that these comments reveal is lack of confidence based on academic credentials. This is a far cry from sex discrimination.

25 The district court's findings recited these comments. *See* FOF 76-86.

26 Ezold did receive one "distinguished/good" from Stephen Goodman, who had substantial contact with her, in May 1987. In addition, she received a "distinguished" in legal analysis in 1983 and 1984 from Bean and in 1985 from Magarity. Wolf contended that one of the factors taken into account by the Associates Committee was whether a partner had a reputation as an especially hard or easy grader. There is strong evidence supporting Wolf's contention that Magarity was an "easy grader". The record is full of glowing memos that he wrote on behalf of male associates, including Associates A and B. *See* App. at 5126, 5128.

27 The 1988 bottom line memos on Ezold and A were both prepared by Block. His summary of both of their legal analysis grades was "good."

28 The record also shows that A had stronger support from the partners within the litigation department than Ezold did. In 1988, of the twenty-eight partners in the litigation department, thirteen partners viewed A's admission "with favor" and three "with enthusiasm"; only two partners had mixed emotions and only one viewed his admission negatively. Ezold, on the other hand, had much less support from the litigation department partners. Only five partners viewed Ezold's admission "with favor" and only three "with enthusiasm"; four partners had mixed emotions and three viewed her admission negatively.

29 The district court's findings concerning the evaluations of the other associates with whom it compared Ezold are found in FOF 87-118.

30 Of the twenty-eight partners in the corporate department, nine partners viewed F's admission "with favor," two "with enthusiasm," and one negatively.

31 Wolf contends additionally that the district court erred in its post-trial decision to exclude from evidence the evaluation files of three successful female partnership candidates.

Assuming, without deciding, that these files were relevant, we note the district court did not exclude them on grounds of relevancy. Rather, when they were offered on redirect, it ruled they were "beyond the scope" that could have been anticipated on direct examination and were not proper redirect. In any event, in view of our disposition we need not resolve this issue.

32 The district court's complete findings concerning Wolf's assignment process as it related to Ezold are found in FOF 21-40.

33 Magarity also testified that he saw nothing in Ezold's evaluations indicating any bias against her because of her gender.

34 Ezold did not complain when she benefitted from the informal assignment process.

35 The district court failed to do so despite Ezold's proposed finding on the issue.

36 The district court made no finding concerning another incident involving Ezold. In that respect, the record indicates that Ezold was chastised for her handling of a request to reassign a case. Kurland had told Ezold that she should not handle any more small cases so she could free herself up for more substantial matters. He said that if she was assigned small cases she should come to him about reassignment. When Arbittier sent her the file in a simple bankruptcy case she sent it back with a note asking that it be reassigned. The record indicates that Ezold was criticized for just sending the file back with a note instead of talking to someone first. There is, however, no mention of this incident in any of Ezold's evaluations.

37 In *Lockhart,* there was sufficient indirect evidence to support the jury's verdict that age was the determinative factor in Lockhart's discharge. This evidence included: (1) Lockhart had received satisfactory performance evaluations and merit salary increases in each year over his twenty-two year career with the company; (2) he had never received a reprimand or demotion; (3) the alleged reason for his discharge was discrepancies found in an audit of his office, however, he was never given an opportunity to explain these discrepancies prior to his termination; (4) his immediate supervisor testified that he was a good and dependable worker and that the standard company policy was to proceed through a series of reprimands before an employee would be dismissed; (5) the second person responsible for his termination also testified that Lockhart was never insubordinate and never deliberately violated company policy; and (6) there was evidence that the company had decided to undertake a major restructuring which resulted in the consolidation of several locations and the filling of new management positions by much younger and inexperienced individuals. 879 F.2d at 49-50.

38 It bears repeating in this final stage of discussion that Wolf's impression of Ezold's legal analytic ability, informed but at the same time subjective, is the focal point in this case and that Wolf is entitled to form its own subjective judgment on that factor. Wolf is also entitled to be wrong in its judgment so long as it does not base its incorrect decision on unlawful sex discrimination or stereotype.

39 For hostile environment to be actionable under *Meritor,* it must be sufficiently severe or pervasive "to alter the conditions of [the plaintiff's] employment and create an abusive working environment." *Id.* at 67, 106 S.Ct. at 2405 (quotation omitted); *see also Rogers v. EEOC,* 454 F.2d 234, 238 (5th Cir.1971) ("mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not sufficiently affect conditions of employment to violate Title VII), *cert. denied,* 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972); *Fox v. Ravinia Club, Inc.,* 761 F.Supp. 797, 801 (N.D.Ga.1991) (evidence of casual atmosphere and loose conversation that sometimes had sexual connotations or implications insufficient to prove hostile working environment).

* Hon. Collins J. Seitz, Senior Circuit Judge of the United States Court of Appeals for the Third Circuit, was limited to voting for panel rehearing.

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868 F.Supp. 1422
United States District Court,
E.D. Wisconsin.

Malcolm D. FLAVEL, individually and on behalf of all other persons similarly situated, Group Representative Plaintiff
and
Robert F. Cnare, James R. Conradt, Major Coxhill, Robert K. Elbel, Malcolm D. Flavel (deceased), Russell H. Graff, Robert L. Isferding, Robert E. Jones, Chalasani C. Rayan (deceased), Richard Spoonamore and Ronald J. Weiss, Individual Plaintiffs,
and
The United States Equal Employment Opportunity Commission, Intervenor Plaintiff representing the 11 named plaintiffs above, plus Robert W. Belling, Conrad Heinemann, William D. Meager, Byron K. Smay, and Robert Van Dyke, as additional plaintiffs represented by the United States,
v.
SVEDALA INDUSTRIES, INCORPORATED, and Svedala Incorporated, Defendants.

No. 92–C–1095. | Nov. 10, 1994.

Terminated employees brought individual and class claims against employer under Age Discrimination in Employment Act (ADEA). On employer's motion for summary judgment, the District Court, Warren, J., held that: (1) employees established prima facie case of discrimination; (2) employees established that employer's proffered reasons for termination were pretextual; (3) plaintiffs would be allowed to call each named plaintiff in establishing their prima facie case; and (4) plaintiffs would not be allowed to adjust analytical framework of *Teamsters* by requiring defendants to present all defense evidence relevant to liability during prima facie stage of trial.

Motion denied.

West Headnotes (55)

[1] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Standard that, where record taken as a whole could not lead rational trier of fact to find for nonmoving party, there is no genuine need for trial and summary judgment is proper, is applied with extra rigor in employment discrimination cases, where intent and credibility are crucial issues. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[2] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Plaintiff's presentation of more than a scintilla of evidence supporting existence of illegitimate motive is enough to preclude summary judgment on ADEA claim. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[3] **Federal Civil Procedure**
Burden of Proof

On motion for summary judgment, neither party may rest on mere allegations or denials in pleadings or upon conclusory statements in affidavits, and both parties must produce proper documentary evidence to support their contentions. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[4] **Federal Civil Procedure**
Presumptions

In deciding summary judgment motion, court need not draw every inference from the record, but only reasonable references. Fed.Rules

Civ.Proc.Rule 56, 28 U.S.C.A.

[5] **Civil Rights**
Age Discrimination
Civil Rights
Age Discrimination

In age discrimination cases where disparate treatment of single employee is at issue, plaintiff may prove age discrimination in one of two different ways; she may either produce direct or circumstantial evidence that age was determining factor in her discharge, or, as is more common, she may utilize the indirect, burden-shifting method of proof for Title VII cases originally set forth in *McDonnell Douglas*, and later adapted to age discrimination under ADEA. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[6] **Civil Rights**
Age Discrimination

Direct evidence of discrimination includes any acknowledgement by defendant that discriminatory intent was behind its treatment of plaintiff; circumstantial evidence, in turn, may involve, inter alia, proof of suspicious timing, ambiguous statements and behavior, inappropriate remarks, and comparative evidence of systematically more favorable treatment toward similarly situated employees not sharing the protected characteristic.

[7] **Civil Rights**
Prima Facie Case

Under burden shifting approach of *McDonnell Douglas*, plaintiff must initially establish prima facie case of discrimination by showing that: (1) she was member of protected class; (2) she was doing the job well enough to meet employer's legitimate expectation; (3) she was discharged or demoted; and (4) employer sought replacement for her.

[8] **Civil Rights**
Age Discrimination

If plaintiff succeeds in establishing prima facie case of age discrimination, this creates rebuttable presumption of discrimination, and burden of production shifts to employer to articulate legitimate, nondiscriminatory reason for employee's discharge; if employer is successful, presumption dissolves, and burden shifts back to employee to show that employer's proffered reasons are pretext for age discrimination. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[9] **Civil Rights**
Age Discrimination

If age discrimination plaintiff successfully shows that employer has offered pretext, that is, a phony reason, for firing employee, then trier of fact is permitted, although not compelled to infer, that real reason was age. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[10] **Civil Rights**
Age Discrimination

In attempting to show that employer's proffered reasons are pretext for discrimination, plaintiff might be well advised to present evidence of discrimination in addition to that required to

demonstrate pretext, because ultimate burden of persuading trier of fact that defendant intentionally discriminated against plaintiff remains at all times with plaintiff, and because fact finder is not required to find in plaintiff's favor simply because she establishes prima facie case and shows that employer's proffered reasons are false.

[11] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

In employment discrimination action, for summary judgment purposes, nonmoving plaintiff must only produce evidence from which rational fact finder could infer that employer lied about its proffered reasons for dismissal. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[12] **Civil Rights**
Disparate Treatment

In ADEA representative action brought by either Equal Employment Opportunity Commission (EEOC) or individual plaintiff alleging pattern or practice of disparate treatment, analytical framework which applies is analogous to framework in individual age discrimination claim. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[13] **Civil Rights**
"Pattern or Practice" Claims

Plaintiffs who raise pattern or practice class claim have as their initial burden the task of demonstrating that unlawful discrimination has been regular policy of employer, i.e., that discrimination was company's standard operating procedure, that is, the regular rather than the unusual practice.

1 Cases that cite this headnote

[14] **Civil Rights**
Age Discrimination
Civil Rights
Age Discrimination

Plaintiffs who raise pattern or practice class claim meet their burden of demonstrating that unlawful discrimination has been regular policy of employer by either producing direct or circumstantial evidence that their employer effectuated pattern of discriminatory age-based decision making, or utilizing burden-shifting method of proof similar to that articulated in *McDonnell Douglas*.

1 Cases that cite this headnote

[15] **Civil Rights**
Weight and Sufficiency of Evidence
Federal Civil Procedure
Damages

Under burden-shifting approach, pattern or practice discrimination actions are generally bifurcated at trial into two parts, which are liability, or prima facie phase, where plaintiffs must prove discriminatory policy by preponderance of evidence, and remedial phase, where scope of relief awardable to each individual plaintiff is litigated.

1 Cases that cite this headnote

[16] **Federal Civil Procedure**
Damages

Under burden-shifting approach applicable to pattern or practice discrimination actions, efficiency is best enhanced if same jury makes liability and remedial factual findings, as: (1) plaintiffs need not reintroduce in remedial phase

anecdotal evidence already presented during liability phase; (2) defendants need not reintroduce in remedial phase defenses already presented in liability phase; and (3) conflicting discrimination findings as to plaintiffs whose cases are litigated in liability phase are avoided.

[17] **Civil Rights**
"Pattern or Practice" Claims

Formal written policy is not required to establish pattern or practice of unlawful discrimination on part of employer; informal or unstructured method of decision making may be sufficient to invoke this doctrine.

[18] **Civil Rights**
Prima Facie Case

In prima facie phase of employment discrimination trial, plaintiffs need not offer evidence that each person for whom they will ultimately seek relief was victim of employer's discriminatory policy; their burden is to establish prima facie case that such policy existed.

[19] **Civil Rights**
Prima Facie Case

In establishing prima facie case of pattern and practice discrimination, plaintiffs should produce statistical evidence demonstrating substantial disparities in application of employment actions as to protected and unprotected group, buttressed by anecdotal evidence of general policies or specific instances of discrimination.

[20] **Civil Rights**
Weight and Sufficiency of Evidence

Absence of statistical evidence must not invariably prove fatal in every pattern or practice employment discrimination case; where overall number of employees is small, anecdotal evidence may suffice.

[21] **Civil Rights**
Prima Facie Case

In some pattern or practice employment discrimination cases, plaintiff's statistical evidence alone might constitute prima facie case.

[22] **Civil Rights**
Weight and Sufficiency of Evidence

Neither statistical nor anecdotal evidence is automatically entitled to reverence to the exclusion of the other in pattern or practice employment discrimination case; however, when one type of evidence is missing altogether, the other must be correspondingly stronger for plaintiffs to meet their burden.

[23] **Civil Rights**
Prima Facie Case

Where plaintiff class in pattern or practice employment discrimination case is prohibitively large for each plaintiff to provide individual testimony of alleged discriminatory conduct, plaintiffs regularly present anecdotal testimony from subset of plaintiffs in seeking to establish their prima facie case; in order to establish prima facie case, anecdotal evidence must suggest broad-based discrimination, and providing mere

isolated or sporadic discriminatory acts by employer is insufficient.

[24] **Civil Rights**
Prima Facie Case

During liability, or prima facie, stage of pattern or practice employment discrimination action, defendants may counter plaintiffs' proof through cross-examination and presentation of rebuttal evidence, both statistical and anecdotal, in attempt to show that plaintiffs' proof is either inaccurate or insignificant.

[25] **Civil Rights**
Practices Prohibited or Required in General; Elements

To counter plaintiff's proof during prima facie stage of pattern or practice age discrimination action, employer might show, as an example, that claimed discriminatory pattern is product of hiring which occurred prior to ADEA rather than unlawful post-Act discrimination, or that during period employer is alleged to have pursued discriminatory policy it made too many employment decisions to justify inference that it had engaged in regular practice of discrimination. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[26] **Civil Rights**
Weight and Sufficiency of Evidence

In employment discrimination action, strength of rebuttal evidence that defendants must produce to prevent plaintiffs from carrying burden of persuasion as to disparity in treatment among employee groups depends, as in any case, on strength of plaintiffs' proof.

[27] **Civil Rights**
Prima Facie Case

In rebutting employee's prima facie case of pattern or practice employment discrimination, employer's defense must be designed to meet prima facie case of employee; although court does not mean to suggest that there are any particular limits of type of evidence employer may use, at liability stage the focus often will not be on individual hiring decisions, but on pattern of discriminatory decision making.

[28] **Civil Rights**
Prima Facie Case

At prima facie stage of pattern or practice employment discrimination action, while defendants may attempt to establish nondiscriminatory reason for adverse employment decision against testifying plaintiff, they need not do so depending on their assessment of strength of plaintiffs' evidence; focus is on presence or absence of company-wide discriminatory policy, and not on individual employment decisions.

[29] **Civil Rights**
Age Discrimination

In rebutting plaintiff's prima facie case in pattern or practice employment discrimination action, defendant may, as an example, simply question accuracy of testifying plaintiff's recollection, or attempt to show absence of any age-based references toward that employee.

[30] **Civil Rights**
"Pattern or Practice" Claims

In pattern or practice employment discrimination action, it is only during the second, or remedial, phase of trial that defendants must establish that individual plaintiffs were not, in fact, victims of discriminatory practice in order to escape liability.

[31] **Civil Rights**
Age Discrimination

Throughout prima facie stage of pattern or practice age discrimination action, plaintiffs bear burden of persuasion as to establishing prima facie case. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[32] **Civil Rights**
Practices Prohibited or Required in General; Elements

At close of liability phase of pattern or practice age discrimination trial, jury is asked through appropriate instructions whether or not plaintiffs have met their burden of establishing by preponderance of evidence that defendants engaged in pattern or practice of age discrimination during relevant time frame; if jury responds negatively, then trial of plaintiffs' claim is completed and plaintiffs are left to pursue individual discrimination claims, presumably before different fact finder, but if, on the other hand, jury responds affirmatively, court may award prospective relief to plaintiffs. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[33] **Civil Rights**
Effect of Prima Facie Case; Shifting Burden

In pattern or practice employment discrimination action, effect of jury's determination that plaintiffs did not meet their burden of establishing that defendants engaged in pattern or practice of discrimination is to leave plaintiffs with burden of proving, without assistance from pattern and practice evidence, that each actionable termination suffered by plaintiffs was product of intentional discrimination on part of defendant; plaintiffs, in other words, can neither bolster their individual claims for relief with proof that defendants engaged in systemwide practice of racial discrimination, nor can they shift burden of proof to defendants.

[34] **Federal Civil Procedure**
Damages

Where jury determines that plaintiffs have met their burden of establishing that defendants engaged in pattern or practice of age discrimination, in order to determine scope of individual relief to which plaintiffs might be entitled, court must move to second, or remedial, phase of trial.

[35] **Civil Rights**
Age Discrimination

If plaintiffs prevail in liability, or prima facie, phase of pattern or practice employment discrimination trial, then proceedings move into the second, or remedial phase, where proof of pattern or practice supports inference that any particular employment decision, during period in which discriminatory policy was enforced, was made in pursuit of that policy; under such circumstances, it is presumed that each

individual plaintiff has been victim of age discrimination at hands of defendant.

[36] **Civil Rights**
Effect of Prima Facie Case; Shifting Burden

During remedial phase of pattern or practice employment discrimination action, presumption of discrimination shifts to defendants the burden of demonstrating that individual plaintiffs were not victims of the discriminatory practice; this includes not only burden of production, but also burden of persuading trier of fact that it is more likely than not that employer did not unlawfully discriminate against individual.

[37] **Civil Rights**
Effect of Prima Facie Case; Shifting Burden

Teamsters approach to pattern or practice employment discrimination action differs from traditional *McDonnell Douglas* analysis in that, under *Teamsters* approach, burden of persuasion can shift from plaintiffs to defendants.

[38] **Civil Rights**
Age Discrimination

During remedial phase of pattern or practice age discrimination action, to rebut presumption of discrimination as to each plaintiff, defendants must establish by preponderance of evidence that age discrimination was not determining factor or but-for element in their employment decisions. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[39] **Civil Rights**
Presumptions, Inferences, and Burden of Proof

To rebut presumption of discrimination during remedial phase of pattern or practice discrimination action, defendants may present evidence demonstrating that plaintiffs' proof is either inaccurate or insignificant, or that nondiscriminatory explanation exists for presumed discrimination termination of each plaintiff.

[40] **Civil Rights**
Measure and Amount

Amount of damages awardable to each plaintiff is litigated during remedial phase of pattern or practice employment discrimination trial.

[41] **Civil Rights**
"Pattern or Practice" Claims

During remedial stage of pattern or practice employment discrimination action, plaintiffs may counter defendants' proof through cross-examination and presentation of rebuttal evidence in attempt to show that defendants' nondiscriminatory justifications for employment decisions are merely pretext for discrimination.

[42] **Civil Rights**
Motive or Intent; Pretext

As general rule, employment discrimination plaintiff may establish that defendants' nondiscriminatory justification for their employment decision is pretextual directly with evidence that defendants were more likely than

not motivated by discriminatory reason, or indirectly by evidence that defendants' explanation is not credible.

[43] **Civil Rights**
Presumptions, Inferences, and Burden of Proof

Unlike *McDonnell Douglas* format applied to individual employment discrimination claims, *Teamsters* model applicable to pattern or practice claims imposes no burden on plaintiffs to produce evidence that defendants' proffered nondiscriminatory reason for employment decisions is pretextual, and burden of persuading fact finder that age discrimination was not determining factor in each of defendants' employment decisions remains with defendant.

[44] **Civil Rights**
Weight and Sufficiency of Evidence

Strength of rebuttal evidence that plaintiffs must produce to prevent defendants from carrying their burden of persuasion during remedial phase of pattern or practice employment discrimination trial will depend, as in any case, on strength of defendants' proof.

[45] **Civil Rights**
Instructions

At end of remedial phase of pattern or practice age discrimination trial, jury is asked through appropriate instructions whether defendants willfully violated ADEA, and whether defendants have proven by preponderance of evidence that each individual plaintiff was not victim of age discrimination; they are also asked to assess damages for each named plaintiff. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[46] **Civil Rights**
Effect of Prima Facie Case; Shifting Burden
Civil Rights
Admissibility of Evidence; Statistical Evidence

Where individual and class claims of employment discrimination are brought contemporaneously, court should consider evidence relating to individual claims in their assessment of class claim, and vice versa, since evidence relevant to one is also relevant to the other; class claim, however, is to be considered first, since if class claim has merit, named and unnamed individual class members are entitled to burden-shifting presumption of *Teamsters*.

[47] **Civil Rights**
Age Discrimination

Terminated employees established prima facie case of pattern or practice age discrimination; manager who was asked to calculate average age of salaried employees at facility expressed concern that such request was part of overall program to get rid of older workers, general manager commented when receiving list of employees who were age 60 and older that there were many long service employees and there was need for new blood in organization, general manager stated that problem with facility was that "we have too many old people in their jobs too long," and general manager stated that average age of sales force of 55–56 years old was too high and that younger and more aggressive sales force was needed. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[48] **Civil Rights**
Motive or Intent; Pretext

Terminated employees met their burden of demonstrating that employer's explanations for their termination was merely pretext for age discrimination; employee who was terminated allegedly because he did not have in place adequate safety programs had history of satisfactory performance, employee who was terminated allegedly because his responsibilities were transferred and funding for his research was eliminated was passed over for several open positions by employer, and employee who was terminated allegedly because he resisted implementation of Total Quality Management (TQM) principles merely expressed doubts about applicability of certain specific management strategies to his small department. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[49] **Civil Rights**
Motive or Intent; Pretext

Terminated employee met his burden of establishing that employer's proffered reason for his termination was pretext for age discrimination; although employer maintained that employee was dismissed after his responsibilities were transferred in response to customer complaints and after further consolidation of operation obviated need for on-site manager at employee's facility, employee was not notified as to concerns over his performance, employee received merit pay increase, employee had not recently received performance appraisals, and termination letter did not mention performance problems as cause for termination. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[50] **Civil Rights**
Motive or Intent; Pretext

Terminated employees met their burden of establishing that employer's explanations for their "retirements" were pretext for age discrimination; although employer maintained that employees voluntarily retired, evidence indicated that employees were constructively discharged after employer imposed inflated sales quota on first employee during recessionary year and unduly criticized his performance, created new job description for district sales managers which included "trumped up" physical requirements for second employee who had medical condition, and subjected third employee to verbal harassment and adverse treatment. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[51] **Labor and Employment**
Constructive Discharge

Demonstrating constructive discharge requires showing that reasonable employee would have felt compelled to resign under circumstances of case.

[52] **Labor and Employment**
Constructive Discharge

Constructive discharge involves more than mere inconvenience or alteration of job responsibilities; it is instead established by indicating demotion evidenced by decrease in wage or salary, less distinguished title, material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

[53] **Civil Rights**
Admissibility of Evidence; Statistical Evidence

In pattern or practice age discrimination action, district court would allow plaintiffs to call each named plaintiff as witness in establishing prima facie case, given relatively small size of plaintiff class, plaintiffs' need to present more than isolated or sporadic discriminatory acts to meet their prima facie case, and general reluctance to limit degree of evidence deemed necessary by plaintiffs to meet their evidentiary burden. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[54] **Civil Rights**
Effect of Prima Facie Case; Shifting Burden

Plaintiffs in pattern or practice employment discrimination action who intended to have each named plaintiff testify in presenting their prima facie case would not be allowed to adjust analytical framework of *Teamsters* by requiring defendants to present all defense evidence relevant to liability, including nondiscriminatory reasons for each plaintiff's termination during prima facie stage of trial; such adjustment could prejudice defendants by lengthening trial and lead to complication of special verdict form used by jury.

1 Cases that cite this headnote

[55] **Federal Civil Procedure**
Time for Consideration of Motion

In employment discrimination action in which plaintiffs brought pattern and practice claim as group, and brought individual discrimination claims as well, employer's motion for summary judgment as to individual discrimination claims, which it brought contemporaneously with motion for summary judgment as to pattern or practice claims, was premature; finding of pattern or practice discrimination would obviate need to separately pursue individual discrimination claims, and, should jury determine that employer did not engage in pattern or practice of discrimination, employees could pursue individual discrimination claims in subsequent proceedings which would require court resolution under *McDonnell Douglas* format rather than *Teamsters* format utilized in pattern or practice case.

Attorneys and Law Firms

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Opinion

DECISION AND ORDER

WARREN, District Judge.

Before the Court are the defendants' Motions for Summary Judgment as to (1) the Age Discrimination Claim of Plaintiff Robert Van Dyke, (2) the Age Discrimination Claims of Plaintiffs Ronald Weiss, Malcolm Flavel and Richard Spoonamore, and (3) those Plaintiffs Alleging Constructive Discharge—Byron Smay, William Meagher, Robert Isferding, Robert Jones, Major Coxhill, and James Conradt. For the following reasons, these motions are denied.

I. *FINDINGS OF FACT*

A. Plaintiffs Ronald Weiss, Malcolm Flavel, and Richard Spoonamore:

The Appleton operation of defendant Svedala Industries, Inc. ("SI") was responsible for the design, engineering, manufacturing and marketing of crushing equipment and screens. (Def.Proposed Findings of Fact ¶ 1.) Crushing equipment takes large mined rocks, some up to eight feet in diameter, and crushes them into small pieces; screens are then used to segregate rock particles by size. (*Id.*)

In April of 1989, William Farnsworth, who had been General Manager of the Appleton facility for many years, retired. (*Id.* at ¶ 2.) Mr. Farnsworth was replaced on November 15, 1989 by William Guernsey, who had been General Manager of Consolidated Diesel, a ***1429** joint venture between Cummins Engine Company and J.I. Case. (*Id.* at ¶ 3.)

1. *Ronald Weiss:*

When Mr. Guernsey interviewed for the general manager position with officers of Svedala Industri A.B. ("SIAB"), SI's Swedish parent corporation, various shortcomings of the Appleton management team were discussed, including the performance of plaintiff Ronald Weiss, Appleton's Manager of Manufacturing. (Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 46–47.) Mr. Weiss had started with SI's predecessor, Allis–Chalmers, in 1972, and was employed as the Manager of Manufacturing at Appleton since 1981. (Def.Proposed Findings of Fact ¶ 8.) Each written performance review prepared by Mr. Farnsworth for the five years before Mr. Guernsey was hired rated Mr. Weiss at the second from the top of six rating levels; none mentioned any "improvement needs," and all listed "upper management" or "general management" as Mr. Weiss' "long range career objectives." (Pl.Resp. to Def.Proposed Findings of Fact ¶ 2.) Mr. Weiss received favorable annual performance appraisals every year until 1990; it is disputed whether Mr. Farnsworth ever expressed dissatisfaction to anyone about his performance. (*Id.* at ¶¶ 4–6.) Mr. Farnsworth nominated Mr. Weiss to attend the personnel development center to be conducted by SIAB at Nordic Hills Training Center; Mr. Weiss and all other Appleton nominees over forty (40) years of age were rejected, and only the youngest, Pat Quinn—then age thirty-eight (38)—was invited to attend. (*Id.* at ¶¶ 39–40.) Mr. Farnsworth also recommended Mr. Weiss, along with Jim Gregor or Hugh Foy, as his replacement. (*Id.* at ¶ 38.) The 1989 performance review for Mr. Quinn describes him as a "solid young manager with very high potential," and the 1989 performance review for Mr. Gregor, Appleton's Manager of Sales, lists the "need to develop young generation of salesmen & mgt. candidates" as his improvement needs; the progress review for Mr. Weiss dated February 8, 1990 dropped him from a near-top ranking to the bottom. (*Id.* at ¶ 50.)

According to the defendants, Mr. Guernsey, upon arriving at Appleton, concluded that costs relating to quality control, purchasing, and inventory were too high, and that plant safety was a problem. (Def.Proposed Findings of Fact ¶¶ 10–13; 15, 17). Mr. Guernsey believed that Mr. Weiss did not have in place an adequate safety improvement program, and held him responsible for cost problems. (*Id.* at ¶¶ 14, 16–20.) Under Mr. Weiss' management, the Appleton facility had in place a management safety council, a safety brigade, safety tours, weekly safety programs, safety posters, periodic safety contests, safety awards, and a full-time nurse. (Pl.Resp. to Def.Proposed Findings of Fact ¶ 21.) The plaintiffs also reference Mr. Guernsey's November 8, 1991 deposition testimony, where he stated that the Appleton facility "had a safety record that was average in the industry," and the fact that the manufacturing operation at Appleton under Mr. Weiss' supervision had been rated as outstanding during the last audit of the program in 1987–88. (*Id.* at ¶¶ 12, 14.) Appleton statistics on safety under Mr. Weiss' management were within OSHA requirements. (*Id.* at ¶ 22.)

The defendants indicate that Mr. Guernsey "is a proponent of the managerial philosophy known as Total Quality Management ("TQM")," which espouses teamwork, accountability, and quantifiable performance goals and objectives. (Def.Proposed Findings of Fact ¶¶ 4–5). The plaintiffs indicate that, in connection with the sale of the mineral systems division of Allis–Chalmers, John Platner, SI's North American President, eliminated the total quality assurance department at Appleton as a cost-savings measure, reassigning TQM to the engineering department, and that Mr. Weiss preserved as much of the TQM program in manufacturing as he could. (Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 15–16.) According to the plaintiffs, Mr. Guernsey never discussed TQM or the safety program at Appleton with Mr. Weiss. (*Id.* at ¶¶ 17–20.)

During the period preceding Mr. Guernsey's arrival at Appleton, Mr. Weiss was working on the largest cost reduction plan that had ever been approved during the eighteen years he had been with the company; he had also received prior approval before ***1430** traveling to China in October of 1989 regarding a sourcing castings project. (*Id.* at ¶¶ 28–32.) Inventory levels at Appleton were not set by the manager of manufacturing operations; instead, a formal master scheduling meeting was held each month involving the general manager and his entire staff, with the former granting final approval for the monthly master schedule, including inventory levels. (*Id.* at ¶¶ 33–35.) The manufacturing operations at Appleton under Mr. Weiss

produced inventory and other products in accordance with the approved master schedule. (*Id.* at ¶ 36.)

In December of 1989, one month after he had replaced Mr. Farnsworth, Mr. Guernsey decided to remove Mr. Weiss as Manager of Manufacturing. (Def.Proposed Findings of Fact ¶¶ 21, 25.) Mr. Guernsey replaced Mr. Weiss with Gerald Dircks, a forty-nine (49) year old former colleague at Consolidated Diesel familiar with TQM principles. (*Id.* at ¶¶ 22–24, 28–29.) Mr. Dircks was interviewed in December, and his hiring was approved by Mr. Planter and Swedish parent manager Jan Knuttson before Christmas. (Pl.Resp. to Def.Proposed Findings of Fact ¶ 41.) Mr. Guernsey announced Mr. Weiss' impending termination to Mr. Gregor and other SI managers; according to Mr. Gregor, Mr. Guernsey stated that "there could be some legal implications involved in this so none of you is to discuss any of this with anybody." (*Id.* at ¶ 42.) According to Mr. Weiss, Mr. Guernsey stated to him in a January of 1990 conversation that "the problem with Appleton is that we have too many old people in their jobs too long." (*Id.* at ¶ 54.) While he had initially considered placing Mr. Weiss in another position, Mr. Guernsey terminated his employment on February 12, 1990. (Def.Proposed Findings of Fact ¶¶ 26–28.) Mr. Weiss was fifty-four (54) years old when terminated. (*Id.* at ¶ 28.) His final rate card, signed by Mr. Guernsey, has the "retire" box marked as the reason for "separation from force," rather than "term." or "lay off." (Pl.Resp. to Def.Proposed Findings of Fact ¶ 7.)

On November 2, 1990, Mr. Weiss filed an age discrimination charge with the Wisconsin Department of Industry, Labor and Human Relations ("DILHR"). (*Id.* at ¶ 8.) On November 16, 1990, SI, through its General Counsel John Fons, responded to Mr. Weiss' charge, stating that:

> "After his start with Boliden Allis, Inc., Mr. Guernsey reviewed the past and current performance of each manager and, based on Mr. Weiss's performance and willingness to be a team player, determined that Mr. Weiss would not be able to meet his expectations. Rather than insult Mr. Weiss by demoting him, Mr. Guernsey offered Mr. Weiss a severance package which included salary continuation to age 55, enabling Mr. Weiss to then qualify for retiree health benefits."

(*Id.* at ¶ 9.) On January 9, 1991, DILHR made a probable cause finding in favor of Mr. Weiss. (*Id.* at ¶ 10.)

2. Malcolm Flavel:

Before SI acquired the Appleton unit out of the Allis–Chalmers bankruptcy on January 1, 1988, plaintiff Malcolm Flavel participated in the international marketing of Appleton products, working extensively in the Far East, and was involved in comminution research, the study of how rocks and minerals break up. (Def.Proposed Findings of Fact ¶¶ 30–31.) Shortly before the acquisition, Mr. Platner had rated Mr. Flavel first among the fifteen (15) key employees at Appleton, stating that he "[did not] think there is any way [SI] could replace his knowledge." (Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 63–64.) Mr. Flavel had received significant awards for his work and held mining equipment patents. (*Id.* at ¶ 65.) On October 17, 1990, Mr. Guernsey terminated Mr. Flavel; Mr. Flavel was fifty-four (54) years of age. (*Id.* at ¶ 40; Pl.Resp. to Def.Proposed Findings of Fact ¶ 61.) Mr. Quinn, Mr. Flavel's supervisor at the time of his termination, noted that he "worked hard, was very dedicated and had no performance problems." (*Id.* at ¶ 82.) On September 30, 1992, in response to an administrative charge brought by Mr. Flavel, the EEOC issued a finding of discrimination against SI. (*Id.* at ¶ 57.)

The parties disagree as to the circumstances surrounding Mr. Flavel's dismissal. ***1431** According to the defendants, Minco International A.B. ("Minco") was created as the international sales arm for SIAB, representing its products in areas where the latter had no sales or marketing companies. (Def.Proposed Findings of Fact ¶ 33.) They claim that Minco took over Mr. Flavel's responsibilities for marketing Appleton products in the Far East and the Pacific Rim. (*Id.* at ¶ 34.) They also indicate that, in late 1989 and early 1990, funding for comminution research at Appleton was eliminated. (*Id.* at ¶ 35.) Pursuant to these changes, Minco purportedly agreed to split Mr. Flavel's time and expenses with Appleton. (*Id.* at ¶¶ 36–37.) According to the defendants, Mr. Flavel introduced Peter Kohle, president of Minco, and Lars Strom, another Minco employee, to various Pacific Rim contacts; in the fall of 1990, however, Minco discontinued funding for Mr. Flavel's position. (*Id.* at ¶¶ 38–39.) The defendants indicate that, since Mr. Flavel's termination, no one from Appleton has been employed primarily to travel to Asia to sell Appleton products or to engage in comminution research and development. (*Id.* at ¶ 41.)

According to the plaintiffs, when SI initially responded through then Human Resources Manager Paul Stelter to the administrative charge that Mr. Flavel filed with the EEOC, no mention was made of international sales or Minco; instead, SI stated:

> "Specifically, Mr. Flavel was employed

> by the Allis–Chalmers Corporation (A–C) as a Consultant, Comminution Systems. His was a "one of a kind" research oriented position which, simply put, studied how rocks fractured. In 1988 certain assets of A–C were purchased, including the Appleton operation which produces rock crushing equipment and remains part of an international corporation. Since that time, the basic research and development of our rock crushing machinery has been done in Sweden. Over the last several years it became apparent that we had no work for Mr. Flavel, within his area of expertise."

(Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 56, 67.) The plaintiffs indicate that Mr. Flavel's immediate supervisor when he was terminated was Mr. Quinn, who told Mr. Weiss in late 1989 that Ted Thomas, then age thirty-three (33), would be given additional responsibility in the comminution area. (*Id.* at ¶¶ 66, 70.)

Mr. Quinn also purportedly admitted that the departure of another comminution consultant, Hugh Rimmer, in May of 1990 had created an open position for an application engineer at the company. (*Id.* at ¶¶ 58–59.) According to the plaintiffs, Mr. Quinn admitted that Mr. Flavel was fully qualified to perform such duties; however, instead of offering him the position, SI first offered the job to Joe Pirozzoli, who was younger than Mr. Flavel, and then hired David Urbanek, age twenty-eight (28), on April 1, 1991. (*Id.* at ¶¶ 60–62.) The plaintiffs also indicate that, since Mr. Flavel's termination, Mr. Thomas has traveled to China in connection with sales at the Anshan mining project, on which Mr. Flavel had previously been working, and to other countries. (*Id.* at ¶ 69.)

Finally, the plaintiffs note that during 1990, when Minco had supposedly rejected Mr. Flavel as a participant in its international sales efforts, it was advertising for an open sales position for Latin America; the job requirements stated that applicants be "between 30 and 40, with a background in business and engineering, preferably with a degree from a college or institute of technology." (*Id.* at ¶¶ 71–72.) Mr. Flavel's international sales experience included Latin America; however, Minco hired Ed Pronk, then age thirty-three (33). (*Id.* at ¶¶ 73–75.) In making this decision, the plaintiffs claim that Mr. Stelter and Mr. Quinn were influenced by a fax received from Minco which stated that the ideal candidate's age would be in the 30's; in a June 20, 1990 letter from Mr. Stelter to Mr. Guernsey recommending a termination arrangement for Mr. Flavel, Mr. Stelter noted in the first paragraph that "Mal was born May 8, 1936 and is 54 years old." (*Id.* at ¶ 79.)

3. *Richard Spoonamore:*

Plaintiff Richard Spoonamore, whose date of birth is May 11, 1935, was hired by Allis–Chalmers, SI's predecessor, in July of 1979 as a field service representative. (Def.Proposed Findings of Fact ¶ 42; Pl.Resp. to Def.Proposed Findings of Fact ¶ 84.) Mr. ***1432** Spoonamore was based in Tucson, Arizona, and travelled both internationally and domestically approximately sixty (60) percent of the time. (*Id.* at ¶ 85.) Mr. Spoonamore continued in this capacity when SI purchased the Appleton business on January 1, 1988, reporting to James Gregor, national sales manager for the Appleton facility. (*Id.* at ¶ 86.) Mr. Spoonamore had technical, sales, and managerial experience with other firms involved in the mining and construction industries, had a bachelor of science degree in mechanical engineering, and had received a certificate in quality control courses from the American Society of Quality Control. (*Id.* at ¶ 92.)

In late March or early April of 1990, at the recommendation of Mr. Gregor, Mr. Spoonamore was promoted to manager of the field service department at Appleton; he relocated to Appleton while his family remained in Arizona, and continued to report to Mr. Gregor. (*Id.* at ¶¶ 87–88, 93; Def.Proposed Findings of Fact ¶ 43.) While unhappy with SI's first-year salary offer of $43,200, Mr. Spoonamore agreed to accept the position, noting his desire to have his salary reviewed within one year. (Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 90–91.)

One of Mr. Spoonamore's duties as manager of field service was to coordinate the activities of the field service representatives. (*Id.* at ¶¶ 94–95.) According to plaintiffs, however, his ability to perform this task was "seriously undermined" by Mr. Guernsey, Mr. Quinn, and Mr. Dircks, who "routinely" contacted field service representatives directly, ordered them to perform field service work without notifying Mr. Spoonamore, and "verbally abused [Mr. Spoonamore] in a very severe fashion in front of others." (*Id.* at ¶¶ 95–97.) The plaintiffs also indicate that Mr. Spoonamore's attempts to hire a Warranty Administrator and to obtain a computer system for his department to improve performance were "denied without any explanation"; his request for a training room was also delayed. (*Id.* at ¶¶ 98–104.) Mr. Spoonamore also recommended that additional field service representatives be hired to cover increasing workloads; he was told, however, that he could not hire any additional persons because they "weren't in the budget." (*Id.* at ¶ 105.)

The plaintiffs indicate that, within several months after coming to Appleton, Mr. Spoonamore, through Mr. Gregor and other employees, discovered that Mr. Guernsey was upset with Mr. Gregor for promoting him because he was "too old," "younger people [ ] could take his job," and "he had this young, professional-type guy waiting in the wings who could just step right in and hit the road running." (*Id.* at ¶¶ 107–109.) Later in 1990, Mr. Gregor told Mr. Spoonamore that, despite his satisfaction with Mr. Spoonamore's performance, Mr. Guernsey had told him that Joe Quinn and William Meagher, two salesmen for the Appleton business, were also "too old," that he had "lumped [them] all together," and that Mr. Gregor had to "get rid of you guys." (*Id.* at ¶¶ 110–113.) In August of 1990, Appleton parts manager Gary Wichtel purportedly told Mr. Spoonamore that Mr. Guernsey was not happy with him and other field representatives because of their age, and that he was glad that the people in the parts department were young. (*Id.* at ¶¶ 114–115.)

In 1990, Appleton employees, including managers, were scheduled to attend classes in TQM principles taught at Fox Valley Institute, located three miles from SI's Appleton facility. (Def.Proposed Findings of Fact ¶ 44.) According to the defendants, Mr. Spoonamore was critical of TQM philosophy, calling it "hogwash," as well as the TQM consultant retained to teach the Fox Valley classes, and his attendance at the classes was "sporadic." (*Id.* at ¶¶ 45–47.) The plaintiffs, however, indicate that Mr. Spoonamore merely expressed doubts about the applicability of certain specific management strategies to his small department, that he is conversant with TQM principles and believes they can be effective in assisting businesses like Appleton, and that Mr. Guernsey never discussed TQM principles with Mr. Spoonamore. (Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 173, 175–177.) Moreover, they claim that his "sporadic" attendance only resulted from instructions by Mr. Guernsey and Mr. Stelter that business service, including answering ***1433** phones, should take priority over course attendance. (*Id.* at ¶ 178.)

In late December of 1990 or early January of 1991, Mr. Spoonamore purportedly recommended to Mr. Gregor that each of the field service representatives in his department receive substantial raises in their annual salaries; at that time, two were under age forty (40), Steve Cadieux and Ron Monfils, and two were over age forty (40), Scott Hiller and Al Peterson. (*Id.* at ¶ 119.) Mr. Guernsey endorsed Mr. Spoonamore's recommendation for the two younger employees, approving substantial raises, but overruled his recommendation as to the two older employees, approving only token raises. (*Id.*) Mr. Peterson had begun employment with SI five years after Mr. Monfils and three years after Mr. Cadieux; in 1990, Mr. Hiller received a substantially higher salary than the others, and in 1991 Mr. Peterson received a substantial raise. (Def.Reply to Pl.Resp. to Def.Proposed Findings of Fact ¶ 119.)

Mr. Spoonamore expected to receive a pay increase effective April 1, 1991; when he received his April 15, 1991 paycheck, however, he realized that Mr. Guernsey had not approved a raise in salary. (Def.Proposed Findings of Fact ¶ 48; Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 120, 125.) Mr. Guernsey had never conducted a performance review of Mr. Spoonamore, articulated to Mr. Spoonamore concerns about his performance, or provided written notice of alleged performance deficiencies. (*Id.* at ¶ 126.) The defendants attribute the raise denial to Mr. Spoonamore's "resistance to Guernsey's TQM management philosophy, as well as other problems Guernsey perceived with his performance." (Def.Proposed Findings of Fact ¶ 48.) On April 16, 1991, Mr. Spoonamore hand-delivered to Mr. Gregor a letter of resignation from his management position; in his letter and in a conversation with Mr. Gregor, he noted that he hoped to return to Tucson to "serve [the company] well in the Field Service Representative function," that he would assist his managerial successor during transition, and that he was upset over being denied a raise despite his satisfactory performance. (Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 121–123.) Mr. Gregor and his immediate supervisor, Joe Valitchka, had a conversation regarding Mr. Spoonamore's desired raise; in late April or early May of 1991, Mr. Spoonamore also spoke with Mr. Valitchka, telling him that he would have to return to Arizona if his salary in Appleton were not adjusted. (*Id.* at ¶¶ 124, 127; Def.Proposed Findings of Fact ¶¶ 50–51.)

On Memorial Day weekend of 1991, Mr. Spoonamore packed up his personal belongings and moved from Appleton to Tucson; it is not clear whether he had previously notified Mr. Gregor of his intention to do so. (*Id.* at ¶¶ 52–53; Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 130–131; Def.Reply to Pl.Resp. to Def.Proposed Findings of Fact ¶ 130.) The following Tuesday, Mr. Gregor called Mr. Spoonamore in Tucson, and Mr. Spoonamore agreed to return to Appleton, at SI's expense, to assist in the transfer of his former job as manager of field service; it is not clear whether Mr. Spoonamore was offered a position as a field representative. (Def.Proposed Findings of Fact ¶¶ 54–57; Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 132–135.) During the next week in Appleton, at the request of Mr. Valitchka, Mr. Spoonamore compiled information relating to the costs to be incurred in "starting up" unused equipment sold by SI several years earlier to a Mexican customer; some time earlier, he had estimated the total start-up cost at $50,000, or twice that originally anticipated by SI. (*Id.* at ¶¶ 136–144; Def.Proposed Findings of Fact ¶¶ 58–68.) Mr. Guernsey

and Mr. Spoonamore had met in January or February of 1991 about this estimate; while the defendants claim that Mr. Guernsey limited Mr. Spoonamore to spending $40,000 on such costs, (*Id.* at ¶¶ 67–68), the plaintiffs indicate that Mr. Spoonamore was informed by Mr. Gregor that Mr. Guernsey authorized completion of the start-up, without use of Appleton employees, even if expenses approached $70,000. (Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 145–148.) The start-up of the equipment in Mexico was completed by Memorial Day of 1991 at a cost of over $67,000. (*Id.* at ¶¶ 153–154.)

Before completion of the start-up project, Mr. Spoonamore sent a letter to the Mexican ***1434** customer advising them of the updated cost figures, acknowledging the contract terms calling for $25,260 in start-up charges, and indicating that he would advise them if "costs exceed[ed] the contract figure so [they] will know of any back charges, to expect from the office." (*Id.* at ¶¶ 151–152.) In early June of 1991, after Mr. Spoonamore had returned to Appleton, Mr. Guernsey was informed of the total actual cost expended on the project, approximately $67,000; the defendants indicate that Mr. Guernsey was "extremely upset at Spoonamore's disobeying his directive on the costs relating to the" project. (Def.Proposed Findings of Fact ¶ 71.) Mr. Gregor, however, testified that he "emphatically" believes that Mr. Spoonamore did not "go beyond his authority" in connection with the project. (Pl.Resp. to Def.Proposed Findings of Fact ¶ 149.) SI sought cost recovery from the equipment purchaser; ultimately, the parties reached a $60,000 settlement. (*Id.* at ¶¶ 154–155.)

On Friday of that week, Mr. Spoonamore's employment was terminated in a meeting with Mr. Valitchka and Mr. Stelter. (*Id.* at ¶¶ 157–159; Def.Proposed Findings of Fact ¶ 72.) At this meeting, either Mr. Valitchka or Mr. Stelter stated that Mr. Spoonamore's "resignation was being accepted"; Mr. Spoonamore insists that he never voluntarily resigned. (Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 159–160, 162–163; Def. Reply to Pl.Resp. to Def.Proposed Findings of Fact ¶ 160.) According to the plaintiffs, at the request of Mr. Valitchka and Mr. Stelter, Mr. Spoonamore granted permission for his briefcase and rented vehicle to be searched before leaving. (Pl.Resp. to Del.Proposed Findings of Fact ¶ 161.) According to the plaintiffs, Mr. Spoonamore was never told that he was being terminated because of his purported resistance to TQM principles espoused by Mr. Guernsey. (*Id.* at ¶ 174.)

Mr. Spoonamore filed an unemployment compensation claim in Arizona; on February 19, 1992, an Appeals Board of the Arizona Department of Economic Security found that Mr. Spoonamore "did not express an intention to quit working entirely for the company," and that, when SI told him on May 28, 1991 that "he would be paid field service pay at his old rate, [it] had accepted [his] resignation from the position of manager of field service and had accepted [his] request to be hired as a field service representative." (*Id.* at ¶¶ 163–164.) This finding was affirmed on April 20, 1992 by the Arizona Appeals Board. (*Id.* at ¶ 165.) On July 24, 1991, Mr. Spoonamore filed an age discrimination charge with the EEOC, specifically referencing purported ageist statements made by Mr. Guernsey. (*Id.* at ¶ 182.) In October of 1992, the EEOC issued a Letter of Violation against SI, concluding that they "exercised a preference for younger employees and that preference had its origins with Swedish corporate affiliates," that Mr. Guernsey had "expressed and exercised a preference regarding the retention and promotion of younger staff," and that there was "substantial evidence" of a "campaign of harassment of older employees at the Appleton facility." (*Id.* at ¶ 184.)

B. *PLAINTIFF ROBERT VAN DYKE:*

The Standard Steel Corporation of Los Angeles, California was acquired by Allis–Chalmers in the early 1970's and renamed Stansteel. (Def.Proposed Findings of Fact ¶¶ 7–8.) On January 1, 1988, as part of its acquisition of the Milwaukee unit of Allis–Chalmers, SI acquired the Stansteel operation. (*Id.* at ¶¶ 1–9.) Plaintiff Robert Van Dyke joined Standard Steel in 1966 and performed duties relating to export sales and licensing programs. (*Id.* at ¶ 10.) At that time, Standard Steel employed approximately 400–500 employees. (*Id.* at ¶ 11.) Due to declining business, that number decreased to approximately 300–400 by 1977. (*Id.* at ¶ 12.) In 1977, Mr. Van Dyke, by then the sales administration manager for Stansteel, was terminated as part of a reduction in force caused by the closing of Stansteel's manufacturing facility; approximately forty (40) people were retained to perform non-manufacturing tasks. (*Id.* at ¶¶ 13–14.) Mr. Van Dyke was rehired by Stansteel in 1979, and became the on-site manager in 1984; at that time, Stansteel employed approximately thirty (30) people. (*Id.* at ¶¶ 1, 15–17.) As manager, Mr. Van Dyke was responsible for overseeing the entire business group including engineering, parts sales, quality assurance, ***1435** sales, contract administration and field service. (*Id.* at ¶ 18.)

The Vice–President and General Manager of SI's Milwaukee facility is Dr. Ki Joung. (Pl.Resp. to Def.Proposed Findings of Fact ¶ 7.) Mr. Van Dyke reported directly to Dr. Joung from January 1 to November 30, 1988, when he began reporting to Bobby Faulkner, manager of the product and processes area of the "Minerals Systems Company" at the Milwaukee facility. (*Id.* at ¶ 8.) In November of 1988, a further reduction of the Stansteel work force took place; the parties dispute whether it

resulted from declining sales and whether Mr. Faulkner participated in termination decisions. (*Id.* at ¶¶ 21–22, 26; Def.Proposed Findings of Fact ¶ 19.) Several employees were discharged and responsibility for purchasing, quality assurance, field service, invoicing, accounting, engineering, parts sales, and contract administration were transferred to Milwaukee. (*Id.* at ¶ 20; Pl.Resp. to Def.Proposed Findings of Fact ¶ 9.) According to the plaintiffs, Mr. Faulkner assumed responsibility for one of Mr. Van Dyke's normal managerial duties: resolving holdbacks on certain equipment contracts. (*Id.* at ¶ 10.) The defendants, however, contend that Mr. Faulkner so acted only after receiving customer complaints and determining that Stansteel's outstanding holdbacks were inappropriately high. (Def.Proposed Findings of Fact ¶¶ 23–24; Def.Reply to Pl.Resp. to Def.Proposed Findings of Fact ¶ 10.) The plaintiffs indicate that Mr. Van Dyke was not consulted in any way prior to making these changes; according to the defendants, however, Dr. Joung and Mr. Faulkner advised Mr. Van Dyke about these and other concerns throughout 1989. (Def.Proposed Findings of Fact ¶ 25; Pl.Resp. to Def.Proposed Findings of Fact ¶ 24.) After the November of 1988 reduction-in-force, six employees remained at Stansteel—Mr. Van Dyke, Ed Simonian, Edward (Craig) Turner, Mary Ham, Bernice Wingerson, and Santiago (Jim) Rodriguez. (Def.Proposed Findings of Fact ¶ 22.) Stansteel also retained three former employees, Marcus Rouchaud, Roy Heacock, and Warren Vetter, as consultants. (Pl.Resp. to Def.Proposed Findings of Fact ¶ 27.)

According to the defendants, the Stansteel operation "continued to show disappointing results during 1989." (Def.Proposed Findings of Fact ¶ 26.) Nevertheless, in August of 1989, Mr. Faulkner authorized a 7.1% merit pay increase for Mr. Van Dyke, which was approved in writing by Dr. Joung. (Pl.Resp. to Def.Proposed Findings of Fact ¶ 13.) The defendants claim that, at the end of 1989, Mr. Faulkner and Dr. Joung decided to further consolidate the Stansteel operation with the Milwaukee unit, determining that an on-site manager was not needed at Stansteel because Mr. Faulkner could supervise the operation from Milwaukee. (Def.Proposed Findings of Fact ¶¶ 27–28.) They indicate that this, plus Mr. Faulkner's concerns about Mr. Van Dyke's performance, resulted in a decision to terminate Mr. Van Dyke; they claim that his age was never discussed. (*Id.* at ¶¶ 29–31.) While the plaintiffs indicate that neither Dr. Joung nor Mr. Faulkner had ever questioned Mr. Van Dyke's performance in any way, the defendants claim that Mr. Faulkner discussed with Mr. Van Dyke his concerns regarding customer complaints and performance. (Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 14, 23, 28; Def.Reply to Pl.Resp. to Def.Proposed Findings of Fact ¶ 28.)

Mr. Van Dyke did not receive any performance appraisals as manager of Stansteel after approximately 1984. (Pl.Resp. to Def.Proposed Findings of Fact ¶ 29.) However, in a confidential memo to Mr. Planter pertaining to incentive compensation for Dr. Joung's first reports, Dr. Joung placed Mr. Van Dyke ahead of Mr. Faulkner in his list of incentive compensation candidates. (*Id.* at ¶ 17.)

On January 9, 1990, Mr. Faulkner travelled to Stansteel to terminate Mr. Van Dyke; according to the plaintiffs, he made no mention of any performance problems, instead handing Mr. Van Dyke a termination letter citing restructuring as the cause for elimination of his position. (*Id.* at ¶¶ 15–16, 32–33, 36.) Mr. Van Dyke's age was not discussed during the termination meeting. (Def.Proposed Findings of Fact ¶ 35.) Mr. Van Dyke was sixty-one (61) when he was terminated. (*Id.* at ¶ 37.) The parties agree ***1436** that it was Dr. Joung's decision to discharge Mr. Van Dyke. (*Id.* at ¶ 31; Def.Reply to Pl.Resp. to Def.Proposed Findings of Fact ¶ 31.) After Mr. Van Dyke was terminated, four employees remained at Stansteel—Mr. Simonian, age fifty-five (55); Mr. Turner, age fifty-three (53); Ms. Hamm, age fifty-two (52); and Mr. Wingerson, age fifty-three (53). (Pl.Resp. to Def.Proposed Findings of Fact ¶ 38.) Mr. Van Dyke believes that Stansteel should have terminated Mr. Turner in its restructuring, as specific performance deficiencies had been identified regarding Mr. Turner and Mr. Faulkner had been advised by Mr. Van Dyke that he was unhappy with his performance; the defendants, however, stress that Mr. Van Dyke did not "take any action" against Mr. Turner "even though he was his manager for several years." (*Id.* at ¶¶ 37–38; Def.Proposed Findings of Fact ¶¶ 39–40.) As of January of 1990, Mr. Faulkner was aware of co-workers' complaints about Mr. Turner; as part of the February 1991 reduction-in-force at the Milwaukee facility, Mr. Turner was placed on probation and told that he had to focus on his job duties in order to maintain his employment. (Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 41–42.)

In a set of notes pertaining to the business objectives of the Mineral Systems Company which predated Mr. Van Dyke's termination, Dr. Joung expressed concern that the engineering and sales personnel at Stansteel were too old. (*Id.* at ¶ 18.) In a report to the Swedish parent corporation of SI in October of 1989, Dr. Joung noted that "[t]he average age of BA/Milwaukee employees is quite high ... [t]herefore, we initiated a program in 1989, in which the positions vacated by either retirement or departure were filled with younger people as much as possible." (*Id.* at ¶ 19.) According to the plaintiffs, Dr. Joung called Mr. Van Dyke from time to time to discuss the age of his staff, which Dr. Joung said was "up in age," and suggested that Mr. Van Dyke hire younger people to replace Stansteel personnel. (*Id.* at ¶ 20.) Mr. Van Dyke also contends that

Stansteel had a reasonable backlog of business when he was terminated, and good prospects for future business; the defendants dispute this claim. (*Id.* at ¶ 25; Def.Reply to Pl.Resp. to Def.Proposed Findings of Fact ¶ 25.) Mr. Van Dyke believes that he had more experience with Stansteel's products than Mr. Turner, and that a manager was still needed on site at the Stansteel operation when he was terminated. (Pl.Resp. to Def.Proposed Findings of Fact ¶ 45.)

Mr. Van Dyke never filed an age discrimination charge with the EEOC. (Def.Proposed Findings of Fact ¶ 42.) He did not become involved in this action until he was contacted by the EEOC in late 1993. (*Id.* at ¶ 43.)

C. *PLAINTIFFS ALLEGING CONSTRUCTIVE DISCHARGE:*

Six plaintiffs allege that they were constructively discharged; Byron Smay, William Meagher, Robert Isferding, Robert Jones, James Conradt, and Major Coxhill. (Def.Proposed Findings of Fact ¶ 1.) Each was employed at the Appleton unit, which was responsible for the design, engineering, manufacturing, and marketing of crushing equipment and screens. (*Id.* at ¶¶ 2, 3.)

In their voluminous submissions, the plaintiffs present the following facts as evidence demonstrating a pattern or practice of age discrimination by the defendants. Thomas Older, the president of SIAB, and other Swedish managers have been corporate directors of the defendants since SIAB purchased Allis–Chalmers' assets in early 1988. (Pl.Resp. to Def.Proposed Findings of Fact ¶ 3.) The interlocking management relationship between SIAB and the Appleton and Milwaukee units involve direct, frequent and substantive communication between senior Swedish management and senior American management. (*Id.* at ¶¶ 4, 7.) Business consolidations, staff reorganizations and realignments, business plans and other significant business issues confronting the American subsidiaries are submitted to SIAB for consideration and approval by senior Swedish management. (*Id.* at ¶ 7.) After the January 1, 1988 acquisition of the solids processing business of Allis–Chalmers, Swedish senior management put in place an annual budget review process, conducted in Sweden, to which each of the general managers for the ***1437** United States facilities was "summoned to attend." (*Id.* at ¶ 5.) On a regular basis, and at least annually, Mr. Guernsey and Dr. Joung submitted detailed business plans or reports for consideration and approval by SIAB. (*Id.* at ¶ 6.) Mr. Older, Jan Knuttson, and other senior Swedish managers traveled on a regular basis to the United States to discuss business planning issues with American management. (*Id.* at ¶¶ 6–7.) The Appleton unit submitted detailed financial reports, called "C–Reports," to SIAB on a monthly basis. (*Id.* at ¶ 6.)

The parties dispute whether the SIAB's involvement in the management of the Appleton and Milwaukee units extended to employment policies and decisions, and whether SIAB has been involved in key management and employment policy decisions at the American subsidiaries. (*Id.* at ¶¶ 8–9, 12; Def.Reply to Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 8–9, 12.) When Mr. Guernsey was being interviewed in Sweden by Mr. Older and Mr. Knuttson for the general manager position at Appleton, he discussed specific personnel in Appleton, including Mr. Weiss. (Pl.Resp. to Def.Proposed Findings of Fact ¶ 11.) Mr. Planter was also directly involved in employment decisions and in the formulation of employment policies at the American subsidiaries; the parties dispute whether he was aware of and approved of the termination and/or demotion "of numerous senior and mid-level managers both at the Appleton and Milwaukee Units." (*Id.* at ¶ 13.) As to the Milwaukee terminations which occurred on February 13, 1991, it was Mr. Planter who first met with Wayne Clark from Clark and Kevin to seek personnel consulting services in connection with the terminations; Mr. Clark's handwritten notes reflect that the topic of age was discussed in this meeting. (*Id.* at ¶ 14.)

According to the plaintiffs, both Dr. Joung and Mr. Soriano, another senior manager at the Milwaukee unit, after returning from a conference for senior managers of SI in Sweden, reported that Swedish management was concerned about the high average age of the workforce at the Milwaukee facility, and wanted action taken to bring in younger workers; Swedish management purportedly stated that the Milwaukee unit had an "age problem." (*Id.* at ¶¶ 15–16.) Mr. Soriano also allegedly stated that, while SIAB management believed that Milwaukee had a problem with older workers, it found the "age problem" at Appleton to be even worse. (*Id.* at ¶ 17.) The written business plan submitted to SIAB by Dr. Joung on October 1, 1988 noted the "high average age" of SI's employees as a "principle weakness." (*Id.* at ¶ 18.) In his annual business plan for 1990–91, which was also submitted to senior management at SIAB, Dr. Joung reported that the average age of employees at the Milwaukee unit was still high and that a program had been initiated to fill positions with younger people, which had decreased the average age of employees. (*Id.* at ¶¶ 19–20.) On November 3, 1989, in a written response to questions raised by Mr. Older during the budget review process, Dr. Joung noted that the $7,000 annual salary differential between American and Canadian employees was due to "age, experience, and project and process related expertise and experience." (*Id.* at ¶ 21.) Mr. Older acknowledges that he and Dr. Joung discussed the "high average age" problem. (*Id.* at ¶¶ 22–23.)

Plaintiff James Conradt had worked in the human resources area of the Appleton unit for approximately eighteen (18) years and had been the manager of human resources for four years prior to the end of his employment in May of 1990; he observed employment policies and practices at SI in 1989 which, in his opinion, indicated that SI and senior management at the Appleton facility were implementing a policy of age discrimination against older workers. (*Id.* at ¶¶ 24–26.) Bruce Merten was the manager of human resources for the Milwaukee unit and the manager for human resources at the corporate level for SI in the United States at the time of their acquisition by SIAB. (*Id.* at ¶¶ 27–29.) On several occasions in or about the spring and summer of 1989, Mr. Conradt and Mr. Merten discussed SI's employment practices and their mutual concern that, based on a "youth cult" being imposed by SIAB management, SI management favored younger employees and discriminated against older workers. (*Id.* at ¶¶ 30–33.) Mr. Conradt claims that he was told by Mr. ***1438** Merten that SI had a policy which favored younger workers and discriminated against older employees. (*Id.* at ¶ 33.)

When Mr. Farnsworth retired as general manager at Appleton in April of 1989, senior management at SIAB and the American subsidiaries sought a replacement; Mr. Merten indicated "off the record" to Mr. Conradt that a particular applicant had been rejected because he was "too old." (*Id.* at ¶¶ 35–36.) Mr. Gregor, age forty-five (45) and the general sales manager for the Appleton unit in 1989, was recommended for the position by Mr. Knuttson. (*Id.* at ¶¶ 37–39.) Mr. Gregor traveled to Sweden in early March of 1989 to interview with senior executives of SIAB, including the manager for corporate human resources, who told him that SI was "looking for a guy in his late 30's." (*Id.* at ¶¶ 40–41.)1 Mr. Gregor was also interviewed by Mr. Older, who, *inter alia,* emphasized the many accomplishments he had achieved at a young age and commented about the young ages of other senior executives at SIAB. (*Id.* at ¶¶ 44–45.) In Mr. Gregor's opinion, he was not given the promotion because he was viewed as too old. (*Id.* at ¶ 46.)

Neither Mr. Weiss and Mr. Foy, ages fifty-four (54) and forty-eight (48), respectively, both of whom had been recommended as replacements by Mr. Farnsworth, were promoted to general manager. (*Id.* at ¶¶ 47–48.) SI retained a professional executive search firm, Erwin & Associates, in conjunction with its search for a new general manager at Appleton; Mr. Planter and Mr. Knuttson met with Ron Erwin, informing him that (1) the Appleton business had been populated by "people who had been in the business 30 years or more, and the message was we need to get new and different thinking and leadership that in looking toward the future that isn't just a prologue to the past," and (2) in conducting the general manager search, the managers of the Swedish parent company wanted to avoid "calcified" candidates, which Mr. Erwin considered to mean people who were "resistant to change" or who lacked "adaptability." (*Id.* at ¶¶ 49–53.) Mr. Erwin formally recommended ten candidates to Mr. Planter for the position, and his written reports noted each candidate's age: 51, 49, 44, 49, 42, 39, 39, 45, 42, and 37. (*Id.* at ¶ 55.) The last candidate, Mr. Guernsey, was hired for the position; while SIAB management received copies of each candidate's resume, the parties dispute whether senior SIAB managers made the final hiring decision. (*Id.* at ¶¶ 56–60; Def.Reply to Pl.Resp. to Def.Proposed Findings of Fact ¶ 58.)

Shortly after Mr. Guernsey began employment in early November of 1989, he met with SIAB management to discuss business objectives, planning, personnel issues and related matters. (Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 62–63.) Mr. Guernsey was in regular and direct communication with senior SIAB executives and submitted regular and detailed reports to SIAB regarding the Appleton facility; he also consulted with and reviewed personnel decisions with Mr. Planter. (*Id.* at ¶¶ 64–65.)

Mr. Conradt claims that, within the first five months of Mr. Guernsey's tenure, he observed events exhibiting discriminatory policies on the part of SI and the Appleton unit. (*Id.* at ¶ 66.) In or about the summer of 1989, Mr. Gregor told Mr. Conradt that he had been denied the general manager's position because he was too old and because SIAB management wanted a younger person. (*Id.* at ¶ 67.) In or about the fall of 1989, Mr. Conradt was asked by Mr. Merten to calculate the average age of salaried employees at the Appleton facility; Mr. Conradt was concerned that this request was part of an overall program to get rid of older workers. (*Id.* at ¶ 68.) As he had done in prior years, Mr. Conradt compiled a list of employees sixty (60) years of age or older, which he submitted to Mr. Guernsey in December of 1989. (*Id.* at ¶¶ 69–71.) After receiving the list, Mr. Guernsey purportedly told Mr. Conradt that "[w]e've got an awful lot of long service employees. We need to get some young—ah, new blood into the organization." (*Id.* at ¶ 73.) In January of 1990, Mr. Guernsey ***1439** purportedly stated to Mr. Weiss that "[t]he problem with Appleton is that we have too many old people in their jobs too long." (*Id.* at ¶ 74.) Mr. Conradt reported Mr. Guernsey's statements to Mr. Merten, who responded that Mr. Guernsey's view regarding older employees was standard procedure for SI. (*Id.* at ¶ 77.)

In December of 1989, SI held a management assessment conference at the Nordic Hills Conference Center near Chicago, Illinois. (*Id.* at ¶ 78.) In preparation for the conference, SIAB management instructed managers of the

manufacturing facilities to select candidates for the conference and to provide Swedish management with biographical information, including age. (*Id.* at ¶ 79.) Mr. Farnsworth submitted the names of four candidates, including Mr. Weiss and Mr. Foy, and their biographical information; only the youngest candidate, Mr. Quinn, who was in his thirties, was selected to attend by Swedish management. (*Id.* at ¶¶ 80–81, 83.) The only information submitted to Swedish management was the nominees' job location, name, present title and age; all those selected to attend were in their thirties and forties, and all candidates in their fifties were rejected. (*Id.* at ¶ 82.)

In or about February of 1990, Mr. Conradt became aware that SI intended to terminate Mr. Weiss. (*Id.* at ¶ 85.) Mr. Conradt felt that Mr. Weiss had been an excellent performer and had not been subject to any negative performance reviews justifying termination. (*Id.* at ¶ 88.) When Mr. Conradt objected to Mr. Guernsey that Mr. Weiss' termination would be a mistake, Mr. Guernsey purportedly told him that he had "two choices, [ ] do as I tell you or there is the door." (*Id.* at ¶ 91.) According to Mr. Conradt, he feared that age discrimination would be directed at him for raising such objections, and he felt that he had no choice but to resign. (*Id.* at ¶¶ 92–93.)

On or about February 8, 1990, Mr. Guernsey conducted his first performance review of Mr. Gregor, establishing written performance objectives including the development of a "young generation of salesmen and manager candidates." (*Id.* at ¶¶ 94, 96–99.) During their meeting, Mr. Guernsey told Mr. Gregor that (1) he had calculated the average age of the sales force at Appleton to be 55–56 years old, (2) the average age was too high in his opinion, (3) they needed to hire a younger and more aggressive sales force, (4) the sales staff was "old and stale," and (5) he was not comfortable working with such an "old" group of employees. (*Id.* at ¶ 100.) The parties dispute whether Mr. Platner played any role in establishing any performance objectives. (*Id.* at ¶¶ 95–96; Def.Reply to Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 95–96.) Mr. Guernsey purportedly repeated these sentiments to Mr. Gregor in the months following this meeting, informing Mr. Gregor that, if he could not get rid of those people, Mr. Guernsey would instruct Mr. Stelter to do so. (Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 104–106.) On a number of occasions, Mr. Guernsey ordered Mr. Gregor to terminate Mr. Meagher, a salesman in the Florida region who was in his sixties and who Mr. Guernsey referred to as the "old incompetent in Florida"; he wanted to replace Mr. Meagher with some "young blood." (*Id.* at ¶ 107.)

In or about July of 1990, Mr. Guernsey conducted a mid-year performance review of Mr. Gregor, reminding him of his performance objective to develop a younger generation of salesmen and management candidates. (*Id.* at ¶¶ 113–114.) Mr. Gregor objected, telling Mr. Guernsey that, in his opinion, the older salesmen were doing a good job. (*Id.* at ¶ 127.) During that review, Mr. Guernsey criticized Mr. Gregor's decision to promote Mr. Spoonamore, noting that he had a better candidate who was a "very young, professional guy." (*Id.* at ¶¶ 115–116.) Approximately eleven (11) months later, Mr. Spoonamore was terminated. (*Id.* at ¶ 151.) As previously discussed, Mr. Guernsey and Mr. Gregor dispute the reasons for Mr. Spoonamore's termination. (*Id.* at ¶¶ 152–153.) Mr. Gregor felt that Mr. Guernsey was "fixated" on age as an employment criterion. (*Id.* at ¶ 117.)

Shortly after starting as sales and marketing manager for the Appleton facility in April of 1991, Mr. Valitchka indicated to Mr. Gregor that SI's program was to reduce the average age of its sales force by bringing in ***1440** younger employees. (*Id.* at ¶¶ 120–123.) That same month, a meeting was held in the engineering conference room with Mr. Guernsey, Mr. Quinn, Mr. Gregor and several other employees. After Mr. Gregor noticed some old pictures of equipment on the wall and stated to Mr. Quinn that "you've got some real antiques there," Mr. Guernsey responded "Oh, I thought you were referring to Pat [Quinn's] people." (*Id.* at ¶ 124.)

After Mr. Quinn, age 39, replaced Mr. Coxhill, age 60, as manager of engineering, Mr. Gregor and other managers observed him verbally abuse, intimidate, unfairly criticize, yell obscenities, and humiliate older workers, including Mr. Flavel, Mr. Isferding, Mr. Jones, and others. (*Id.* at ¶¶ 132–133.) Several employees, some at senior management positions, complained about the age discrimination and the harassment of older workers that was occurring at Svedala. (*Id.* at ¶ 134.) Mr. Foy, the controller of the Appleton facility, learned of Mr. Quinn's behavior and, after discussing it with Mr. Gregor, reported it to Mr. Guernsey. (*Id.* at ¶¶ 135–136.) Mr. Gregor also complained to Mr. Fons, general counsel for SI, and Mr. Stelter about age discrimination and harassment directed towards him and SI salesmen, including harassment and abuse being carried out by senior management at Appleton, including Mr. Guernsey and Mr. Valitchka. (*Id.* at ¶¶ 137–138.) After voicing his complaints, Mr. Gregor perceived that discrimination and harassment against him and others intensified. (*Id.* at ¶ 140.)

Mr. Gregor filed a charge of age discrimination with the EEOC in late June of 1991. (*Id.* at ¶ 142.) Several days thereafter, he was fired by Mr. Guernsey, who purportedly admitted that he had been terminated for, among other things, filing a discrimination charge. (*Id.*) After Mr. Gregor was fired, Mr. Valitchka and Mr. Stelter revised the job description for the regional sales representatives,

adding new requirements that the sales representatives be physically able to climb into mines and quarries and engage in other similar kinds of physically demanding activities, and that the regional sales manager be in excellent physical condition. (*Id.* at ¶ 143.) In or about the summer or early fall of 1991, the revised job description for salesmen was sent by Mr. Stelter, at Mr. Valitchka's instruction, to the physicians for the three oldest sales managers: Mr. Meagher, who underwent quintuple-bypass heart surgery; Mr. Pape, who had leukemia, and Mr. Smay, who had told Mr. Valitchka that he could not travel because he was having surgery; the revised job description was not sent to the doctors of the younger salesmen. (*Id.* at ¶¶ 144–145, 147; Def.Reply to Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 144–145, 147.) The physicians were asked to submit a report confirming that these employees could meet the physical requirements set forth in the new job description. (Pl.Resp. to Def.Proposed Findings of Fact at ¶ 144.) The revised job requirements were not included in advertisements for new salesmen. (*Id.* at ¶ 146.) Mr. Gregor viewed these new physical requirements as part of SI's program to rid itself of older employees. (*Id.* at ¶¶ 148–149.)

In or around May of 1990, in response to instructions by Mr. Guernsey, Mr. Coxhill, then the Manager of Engineering at Appleton, compiled an organizational chart for the engineering department at Appleton which included each employee's name, years of service, date of birth, as well as the average age. (*Id.* at ¶¶ 160, 162.) At Mr. Guernsey's instruction, Mr. Coxhill presented this information to Swedish management at the international conference of Svedala engineers and technicians in Brazil later that month. (*Id.* at ¶¶ 161, 163.) Mr. Coxhill was later terminated and replaced by Mr. Quinn. (*Id.* at ¶ 165.) Within two (2) years after Mr. Guernsey became general manager of the Appleton unit, at least eleven (11) employees age fifty (50) or older were no longer employed: Mr. Weiss, age 54; Mr. Flavel, age 54; Mr. Spoonamore, age 56; Mr. Gregor, age 47; Jim Danielson, age 51; John Bandholtz, age 52; Mr. Jones, age 60; Mr. Isferding, age 64; Mr. Meagher, age 65; Mr. Smay, age 59; Mr. Conradt, age 53; and Mr. Coxhill, age 60. (*Id.* at ¶ 166.) SI considered the age of candidates for various employment positions in the company, including those for sales, engineering, human resources, legal, and other jobs. (*Id.* at ¶ 167.)

***1441** Bruce Merten was the human resources manager for SI when the United States facilities were purchased by SIAB from Allis–Chalmers; he was involuntarily terminated at age fifty (50), and replaced by William Lenhart, age forty-four (44), on June 30, 1992. (*Id.* at ¶¶ 168–169, 172.) The resume submitted by Lenhart to SI and SIAB did not include his date of birth; before he was interviewed in Sweden, and after he was asked by the acting human resources manager about his qualifications and experience, Mr. Lenhart was asked whether he was married, whether he had any children, and what his date of birth was—he was also told that, "in Sweden they have no laws against asking folks for their date of birth." (*Id.* at ¶¶ 170–171.) When Mr. Platner selected Mr. Fons as the new general counsel for SI, he utilized Mr. Fons' college graduation date to compute his age, which did not appear on his resume; Mr. Platner acknowledges that he would ask the age of any applicant for a senior management position. (*Id.* at ¶ 173.) Mr. Older similarly acknowledges requesting age information for employees hired by SIAB in Sweden, and SIAB management routinely lists applicants with their ages when hiring new personnel. (*Id.* at ¶ 174–176.) At the Milwaukee unit, applications for employment from older individuals were rejected with handwritten notations on resumes such as "No! 56 yrs old", "No! 53 year", and "MUST BE 65 year old!". (*Id.* at ¶¶ 177, 191.) Several of SI's personnel forms made reference to age, including its Salary Review Worksheet, Salaried Employee Listings, and Salaried Employee Rate Card. (*Id.* at ¶ 179.)

On February 13, 1991, the Milwaukee facility carried out a reduction in force ("RIF") which resulted in the termination of twenty (20) employees; eighteen of the twenty were over age forty (40), and one of the two under age forty (40) and the youngest of the other eighteen were subsequently rehired by SI. (*Id.* at ¶¶ 180–181.) Prior to the Milwaukee unit RIF, senior management from the unit met, together with certain consultants, to identify the specific employees who would be terminated; notes prepared by the consultants had a listing titled "Issues: Age." (*Id.* at ¶ 182.) A series of large flip charts were generated during the RIF planning meetings in Milwaukee containing notes of the discussions from the meetings, including notes about the persons under consideration for termination. (*Id.* at ¶ 183.) After the RIF planning meetings were concluded, the flip charts and notes were collected by Fred Cummings, the acting human resources manager for SI. (*Id.* at ¶ 184.) On July 29, 1992, in response to an EEOC request for information concerning age discrimination charges from two of those terminated in the February of 1991 RIF in Milwaukee, Mr. Lenhart wrote to SI's general counsel as follows: "I have the notes from Fred Cummings involvement, 2 inches worth. We need to sift through those and decide what to retain." (*Id.* at ¶ 185.) The flip charts have been destroyed, lost, or are otherwise missing. (*Id.* at ¶ 186.) Handwritten notes from two persons in attendance at the RIF meetings in Milwaukee include the age and/or date of birth for each person considered for termination; most of the terminated employees were fifty years of age or older. (*Id.* at ¶ 187.) After some of the terminated employees planned an age

discrimination class action, SI prepared written performance "evaluations" for several of them explaining the reasons for their departure; Robert Jermyn, MPSI sales manager, was asked to prepare one such report, even though he had not participated in the RIF planning meeting. (*Id.* at ¶¶ 189–190.)

After they were involuntarily terminated, six of the plaintiffs and several other SI employees filed administrative charges of age discrimination, including Mr. Weiss, Mr. Flavel, Mr. Gregor, Mr. Jones, Robert Cnare, Robert Elbel, and Mr. Spoonamore; DILHR and two separate offices of the EEOC found probable cause to conclude that SI engaged in a practice of age discrimination against its older employees. (*Id.* at ¶ 197.)

1. *Byron Smay:*

Plaintiff Byron Smay was a district sales manager stationed in St. Louis, Missouri. (Def.Proposed Findings of Fact ¶ 4; Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 198–200.) His territory included Arkansas, Illinois, Indiana, Kansas, Michigan, Missouri ***1442** and part of Kentucky. (Def.Proposed Findings of Fact ¶ 5.) Mr. Gregor was Mr. Smay's direct supervisor until his termination and replacement by Mr. Valitchka in July of 1991. (*Id.* at ¶¶ 15–16.) In February of 1990, after Mr. Guernsey had been general manager of the Appleton unit for four months, he told Mr. Gregor that he "had calculated the average age of our sales force, that it was too high, that he was accustomed to working with much younger people, and that [Mr. Gregor] needed to get younger, aggressive people in [the] sales force." (Pl.Resp. to Def.Proposed Findings of Fact ¶ 201.) Mr. Guernsey emphasized this point in Mr. Gregor's February of 1990 performance evaluation, writing that he should develop a "young generation of salesmen and manager candidates." (*Id.* at ¶ 202.) Mr. Gregor believed that the district sales managers reporting to him were knowledgeable, experienced, and doing a good job; however, he felt "tremendous pressure" from Mr. Guernsey to get "young and aggressive type salespeople," and believed that Mr. Guernsey was "fixated completely on the subject of age." (*Id.* at ¶¶ 203–204.)

Prior to replacing Mr. Gregor in April of 1991, Mr. Valitchka was interviewed by an executive search firm retained by SI, which told him that the age of SI's sales force, and its older group of sales representatives, posed a challenge. (*Id.* at ¶ 205.) In April of 1991, following a meeting with Mr. Guernsey, Mr. Valitchka told Mr. Gregor that the sales force was too old, and that the "average age of those people needed to be driven down and we needed to get young salespeople there, period, and that was the strategy." (*Id.*)

Mr. Smay disagreed with Mr. Valitchka's vision of the role of a district sales manager, and, along with the other district sales managers, disliked him and had little regard for his abilities. (Def.Proposed Findings of Fact ¶¶ 18–19.) According to the plaintiffs, SI imposed an inflated sales quota on Mr. Smay for 1991, a year when the industry was in a recession. (Pl.Resp. to Def. Proposed Findings of Fact ¶¶ 218–219.) In October of 1991, either Mr. Valitchka or Mr. Guernsey requested that Mr. Smay come to Appleton to discuss his poor sales performance for new equipment; through September of 1991, he had only achieved 15% of his target goal for new equipment sales. (*Id.;* Def.Proposed Findings of Fact ¶¶ 21–22.) Mr. Smay met with Mr. Valitchka, Mr. Stelter, and Mr. Guernsey, and was criticized for failing to meet his sales quota; no comments were made about his age, and he was not threatened with termination. (*Id.* at ¶¶ 23–25; Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 218–219.) Mr. Valitchka sent Mr. Smay a memorandum in November of 1991 advising him that his performance was "unacceptable and cannot be tolerated"; in an internal memorandum generated months earlier, Mr. Smay was described as "extremely thorough, dedicated, and competent ... one of our best people." (*Id.* at ¶ 220.) According to Mr. Smay, this criticism left him "very hurt and ... [he] knew [he] was gone." (*Id.* at ¶ 221.)

In the summer of 1991, Mr. Smay underwent surgery at Barnes Hospital in the St. Louis area. (*Id.* at ¶ 229; Def.Proposed Findings of Fact ¶ 6.) He did not advise his superiors in Appleton or any other Appleton unit employee about his surgery or any resulting limitations on his work activities. (*Id.* at ¶ 7.) When Mr. Valitchka subsequently learned that Mr. Smay had experienced medical problems, he asked for the name of Mr. Smay's doctor so SI could ensure that he was assigned to a position appropriate for his medical condition. (*Id.* at ¶ 8.) Mr. Smay provided his doctor's name, and Mr. Stelter sent to his doctor a job description for his position of district sales manager, asking him to relate Mr. Smay's condition and prognosis to such position. (*Id.* at ¶¶ 9, 11–12.) According to the plaintiffs, the physical attributes listed in the "new" job description were not included in the version issued the previous year, and were intended to assure that the doctors of older employees would declare them to be unfit. (Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 227–229.) These attributes included excellent physical health, the ability to travel 80 to 90 percent of the week, a usual work week of ten and often 12 hours per day, regular weekend work, and the ability to climb onto structures and mines; according to the plaintiffs, these attributes were not ***1443** included in the job descriptions of other sales managers who did similar work or in advertisements for these jobs. (*Id.*) SI sent similar letters to the doctors of district sales

managers Bernie Pape and William Meagher, who were suffering from cancer and heart disease, respectfully. (Def.Proposed Findings of Fact ¶ 13.) Mr. Smay's position was not altered after the letter was sent to his doctor. (*Id.* at ¶ 13.)

In late 1991, Greg Joseph was hired to fill the sales manager position formerly held by Mr. Gregor, and Mr. Smay began reporting to Mr. Joseph. (*Id.* at ¶¶ 27–28.) In March of 1992, Mr. Joseph met with Mr. Smay to give him his performance review and territory assignment. (*Id.* at ¶ 29.) Mr. Smay told Mr. Joseph that he disagreed with the review in light of his performance in prior years; age was not discussed and Mr. Joseph did not indicate that Mr. Smay would be terminated. (*Id.* at ¶¶ 30–31.) Mr. Joseph also advised Mr. Smay that his territory was being reconfigured to include Arkansas, Kansas, Louisiana, Mississippi, Missouri, Oklahoma, Tennessee, and part of Kentucky. (*Id.* at ¶ 32.) Mr. Smay had first suspected that a territorial reconfiguration was likely when, a few weeks before the review meeting, a customer in Indianapolis showed him an advertisement by SI seeking to fill a newly-created sales position to be stationed in Southern Ohio; although he did not cover Ohio, he suspected that the addition of a new salesman would result in a territorial reassignment. (*Id.* at ¶¶ 33–34; Pl.Resp. to Def.Proposed Findings of Fact ¶ 223.) Mr. Smay was upset about the territorial reassignment because he lost his prime states, Indiana, Michigan, and Illinois, and gained four southern states generally understood to have "zero potential"; however, he did not call the salesman who previously covered his reconfigured territory to confirm this fact. (*Id.* at ¶¶ 223–224; Def.Proposed Findings of Fact ¶¶ 35–36.) Mr. Smay believed that SI was trying to get rid of him. (Pl.Resp. to Def.Proposed Findings of Fact ¶ 225.)

In early May of 1992, Mr. Smay advised Mr. Joseph that he was retiring after twenty-six years of employment with SI and its predecessor, Allis–Chalmers. (*Id.* at ¶ 37; Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 200.) He was replaced by Richard Robinson, age thirty-seven (37). (*Id.* at ¶ 230.) Nobody from SI asked him to retire and he did not tell Mr. Joseph of his age discrimination concerns. (Def.Proposed Findings of Fact ¶ 38.) In a subsequent conversation with Mr. Stelter, Mr. Smay indicated that he wanted to look after some personal investments. (*Id.* at ¶ 39.) Mr. Smay does not recall telling Mr. Stelter that he was coerced to leave. (*Id.* at ¶ 40.) At the time his employment ended, nobody was criticizing him for his 1992 sales performance. (*Id.* at ¶ 41.) Mr. Smay was fifty-nine (59) when he retired. (*Id.* at ¶ 42.) On May 11, 1992, Mr. Joseph sent a letter to Mr. Smay asking him to "reconsider and continue [his] employment with Allis Mineral Systems"; he did not respond. (*Id.* at ¶¶ 43–44.) With Mr. Smay's assistance, SI closed its St. Louis sales office. (*Id.* at ¶ 45.)

On June 15, 1994, Mr. Smay began work with Lippman–Milwaukee Company—a competitor of SI; his boss at Lippman is Mr. Gregor. (*Id.* at ¶¶ 46–47.) He had discussed the possibility of working for Lippman prior to leaving SI. (*Id.* at ¶ 48.) Although he was aware of age discrimination claims being alleged by Mr. Flavel and others when he retired, Mr. Smay did not contact the EEOC or any state agency about his age discrimination concerns. (*Id.* at ¶¶ 49–50.) Mr. Smay did not initially pursue legal action after leaving SI because he was "concerned about getting on with [his] life ... trying to move forward at basically 60 years old is not the easiest thing in the world to do." (Pl.Resp. to Def.Proposed Findings of Fact ¶ 231.) In November of 1993, the EEOC contacted Mr. Smay about becoming involved in this action; Mr. Smay agreed. (Def.Proposed Findings of Fact ¶¶ 51–52.)

2. *William Meagher:*

Plaintiff William Meagher was a district sales manager at Appleton; his office was in Tarpon Springs, Florida, and his territory included Florida, Georgia and Alabama. (*Id.* at ¶¶ 53–54.) In 1987, prior to SI's acquisition of the Appleton unit, he had been asked to list his expected retirement date on a form and return it to the Manager of Employee ***1444** and Community Relations, Jim Conradt. (*Id.* at ¶ 55.) Mr. Meagher indicated that he intended to retire at age sixty-two (62). (*Id.* at ¶ 56.)

Mr. Gregor was the national sales manager directly supervising Mr. Meagher until April of 1991, when he was replaced by Mr. Valitchka; Mr. Joseph replaced Mr. Valitchka in December of 1991. (Pl.Resp. to Def.Proposed Findings of Fact ¶ 200.) In February of 1990, after Mr. Guernsey had been general manager of the Appleton unit for four months, he told Mr. Gregor that he "had calculated the average age of our sales force, that it was too high, that he was accustomed to working with much younger people, and that [Mr. Gregor] needed to get younger, aggressive people in [the] sales force." (*Id.* at ¶ 201.) Mr. Guernsey emphasized this point in Mr. Gregor's February of 1990 performance evaluation, writing that he should develop a "young generation of salesmen and manager candidates." (*Id.* at ¶ 202.) Mr. Gregor believed that the district sales managers reporting to him were knowledgeable, experienced, and doing a good job; however, he felt "tremendous pressure" from Mr. Guernsey to get "young and aggressive type salespeople," and believed that Mr. Guernsey was "fixated completely on the subject of age." (*Id.* at ¶¶ 203–204.) Mr. Meagher was asked about his retirement plans in 1990 by Mr. Gregor, who indicated that he needed to know whether he should budget for a

replacement; Mr. Meagher indicated that he was planning on retiring in March of 1992, on his sixty-fifth (65) birthday. (Def.Proposed Findings of Fact ¶¶ 57–59; Pl.Resp. to Def.Proposed Findings of Fact ¶ 217.)

Although the industry in which SI sold equipment was in a recession, Mr. Guernsey imposed a $1 million sales goal for Mr. Meagher's territory, despite a contrary assessment that, due to the poor economy, an attainable goal was $250,000. (*Id.* at ¶ 212.) Mr. Gregor told Mr. Guernsey that, if Mr. Meagher was going to "increase sales even remotely in the direction of the stretch goals," he would need support in the form of products and designs. (*Id.* at ¶ 213.) Mr. Guernsey told Mr. Gregor that Mr. Meagher was an "old incompetent," and told Mr. Gregor to fire that "old son-of-a-bitch in Florida" and to replace him with "young blood"; when Mr. Gregor protested, Mr. Guernsey said he'd get Mr. Stelter "to figure out a way to do [it]." (*Id.* at ¶¶ 207–208, 213.) Mr. Meagher, unable to meet his sales goal, was informed in October of 1991 that his sales were "obviously unacceptable and below standard," and that "we are taking steps to replace you as soon as possible." (*Id.* at ¶ 214.) Mr. Gregor advised Mr. Meagher that Mr. Guernsey thought he should be fired because of poor sales performance; no mention was made of age. (Def.Proposed Findings of Fact ¶¶ 60–61.) Mr. Gregor told Mr. Meagher not to worry because he was not going to fire him. (*Id.* at ¶ 62.) According to Mr. Meagher, however, his knowledge that Mr. Guernsey had prejudged him as incompetent and wanted him fired "helped make [his] decision to retire." (Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 209–210.)

Prior to replacing Mr. Gregor in April of 1991, Mr. Valitchka was interviewed by an executive search firm retained by SI, which told him that the age of SI's sales force, and its older group of sales representatives, posed a challenge. (*Id.* at ¶ 205.) In April of 1991, following a meeting with Mr. Guernsey, Mr. Valitchka told Mr. Gregor that the sales force was too old, and that the "average age of those people needed to be driven down and we needed to get young salespeople there, period, and that was the strategy." (*Id.*)

On May 13, 1991, while traveling in Alabama on business, Mr. Meagher suffered a heart attack and underwent quintuple-bypass surgery. (Def.Proposed Findings of Fact ¶ 63.) Mr. Meagher was unable to work for several months, during which time he received disability payments. (*Id.* at ¶ 64.) On July 1, 1991, he returned to work on a part-time basis; he was paid on an hourly basis until he resumed full-time status at his former salary. (*Id.* at ¶¶ 66–67.) For several months after he returned to work, Mr. Meagher was limited in his ability to perform his job, including the ability to travel. (*Id.* at ¶ 68.) After returning to work in July of 1991, Mr. Valitchka asked Mr. Meagher to provide a list of his doctors so that SI could ***1445** ensure that he was assigned to a position that was appropriate for his medical condition. (*Id.* at ¶ 69.) Mr. Meagher provided such names, and Mr. Stelter sent letters to his doctors asking for his current status and prognosis for purposes of job placement. (*Id.* at ¶¶ 70–71.) According to the plaintiffs, the physical attributes listed in his "new" job description were not included in the version issued the previous year, and were intended to assure that the doctors of older employees would declare them to be unfit. (Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 227–229.) These attributes included excellent physical health, the ability to travel 80 to 90 percent of the week, a usual work week of ten and often 12 hours per day, regular weekend work, and the ability to climb onto structures and mines; according to the plaintiffs, these attributes were not included in the job descriptions of other sales managers who did similar work or in advertisements for these jobs. (*Id.*) Mr. Meagher's position was not altered after this correspondence. (Def.Proposed Finding of Fact ¶ 72.)

After his heart attack and surgery, Mr. Meagher reiterated his desire to retire upon his sixty-fifth (65) birthday. (*Id.* at ¶ 73.) He specifically encouraged a colleague in his mid-fifties to pursue his job, and he advised another colleague to apply for the position, stating that SI was a good company for which to work. (*Id.* at ¶¶ 76–78.) While disappointed that he was not consulted about the process, Mr. Meagher believed it was reasonable for SI to advertise for his replacement, although he believed that SI exhibited poor judgment by not hiring his replacement at least six months before his retirement so he could properly train the new salesman. (*Id.* at ¶¶ 74–75.) In January of 1992, Mr. Meagher closed down the Tarpon Springs office and arranged for all the files to be shipped to Atlanta, Georgia, where his replacement, Mike Schelble, age twenty-eight (28), was to be located. (*Id.* at ¶ 79; Pl.Resp. to Def.Proposed Findings of Fact ¶ 230.) Mr. Schelble spent several days with Mr. Meagher for training purposes, including attending an industry trade show in New Orleans in February of 1992. (Def.Proposed Findings of Fact ¶¶ 80–82.)

Mr. Meagher retired in March of 1992, on or about his sixty-fifth (65) birthday. (*Id.* at ¶ 84.) SI subsequently flew him and his wife to Appleton for a retirement party. (*Id.* at ¶ 85.) According to Mr. Meagher, he retired because he felt "that they wanted to force me out." (Pl.Resp. to Def.Proposed Findings of Fact ¶ 217.) Mr. Meagher did not file an age discrimination charge with the EEOC because of his limited income after leaving employment, and became involved in this action after being contacted by the EEOC in October of 1993. (*Id.* at ¶ 231; Def.Proposed Findings of Fact ¶¶ 86–87.)

3. Robert Isferding:

Plaintiff Robert Isferding was born on October 12, 1927, and joined Allis–Chalmers on September 15, 1973 as a Senior Application Engineer in Appleton. (Def.Proposed Findings of Fact ¶ 88; Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 292–293.) In 1977, Mr. Isferding transferred to a field sales position in Charleston, West Virginia; in 1985, he returned to Appleton as a Senior Project and Application Engineer. (*Id.* at ¶¶ 294–295.) Mr. Isferding specialized in the sizing and application of screens. (*Id.* at ¶ 296.) Mr. Isferding reported to Mr. Quinn from September of 1985 until July of 1991, and his performance was reviewed yearly. (Def.Proposed Findings of Fact ¶¶ 89–90.) His performance was always satisfactory. (Pl. Resp. to Def. Proposed Findings of Fact ¶ 297.) Mr. Quinn would only allow Mr. Isferding to read the front page of his review, and Mr. Isferding never saw any of Mr. Quinn's comments discussed with him the specific items set forth in the progress review. (*Id.* at ¶ 321.) In each progress review by Mr. Quinn from 1985 through 1989, Mr. Quinn identified "finishing his career in his present position" as Mr. Isferding's long-term career objective; from 1980 to 1983, however, Mr. Farnsworth always included advancing into management in his long-term career objective. (*Id.*) Mr. Isferding testified that his goal had always been to obtain a management position with the company. (*Id.*) On December 22, 1989, Mr. Guernsey sent a memo to all of his managers asking that they identify the projected retirement dates of certain listed individuals; Mr. Quinn, when asked to identify the retirement dates of Mr. ***1446** Isferding, Mr. Jones, and Don Hagen, responded that "all my people underlined in red plan on going till 65!" (*Id.* at ¶ 298.)

Shortly after Mr. Guernsey was hired as general manager at Appleton, Mr. Isferding claims that he began to experience harassment from Mr. Quinn, including kicking objects, screaming, cussing, abusive language, pounding his desk, and throwing books. (*Id.* at ¶ 300.) Mr. Quinn would use foul language, including "God damn" and "fucking," and Mr. Isferding would sometimes back away from Mr. Quinn for fear of being struck. (*Id.*) This conduct continued on an average of "at least once a month until July of 1991." (*Id.*) Mr. Isferding observed Mr. Quinn engage in abusive conduct toward Mr. Jones and Mr. Hagen; while he also observed abusive behavior towards the younger engineers, it was "not as bad as it was with us older engineers." (*Id.* at ¶¶ 301–302.) Mr. Isferding specifically recalls an incident where he and Mr. Jones were in Mr. Quinn's office working on a contract; after asking Mr. Quinn some questions, Mr. Quinn started "throwing a tantrum, swearing and cussing. He kicked the file cabinet, kicked the door, and just humiliated us in public, because the door was open and the whole office could hear what was going on." (*Id.* at ¶ 303.) After Mr. Quinn "went off into a rage" when being questioned by Mr. Isferding about a project, Ron Hirn, a purchaser, approached Mr. Isferding and said that he "ought to go down and knock that son of a bitch on his ass." (*Id.* at ¶ 304.) Mr. Isferding did not tell anyone else about these incidents, and did not report them to Mr. Guernsey. (Def.Proposed Findings of Fact ¶ 95.) None of Mr. Quinn's outbursts ever included comments regarding Mr. Isferding's age. (*Id.* at ¶ 98.) When Mr. Quinn would swear and rage at Mr. Isferding, it would cause Mr. Isferding to "shrink down in his chair." (Pl.Resp. to Def.Proposed Findings of Fact ¶ 305.) After several such instances, Mr. Isferding began avoiding Mr. Quinn. (*Id.* at ¶ 306.) Other employees witnessed such behavior, and SI management was aware of Mr. Quinn's conduct toward Mr. Isferding and other older employees. (*Id.* at ¶¶ 307–310.)

During their January 31, 1991 meeting regarding performance, Mr. Isferding informed Mr. Quinn that he intended to retire after putting twenty (20) years in with the company; Mr. Quinn did not ask him to retire or indicate that he would be fired or that his job was in jeopardy, and told him that his performance was fine. (*Id.* at ¶ 323; Def.Proposed Findings of Fact ¶¶ 91–93.) In the spring of 1991, Mr. Isferding commented to Mr. Gregor that Mr. Quinn's behavior was occurring frequently and was wearing on him; he was losing sleep and behavioral changes were noticed by his wife. (Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 311, 319.) Mr. Gregor told Mr. Quinn that "the way he was treating these people was completely inappropriate"; Mr. Quinn wanted to know which employees were complaining about him, and indicated that he had no intention of changing his style. (*Id.* at ¶ 312.) Mr. Foy was also aware of, and spoke with Mr. Guernsey regarding, Mr. Quinn's abusive behavior. (*Id.* at ¶ 313.) Mr. Platner acknowledged that he knew that Mr. Quinn was an "abusive" manager. (*Id.* at ¶ 315.) During his performance review, Mr. Quinn was told that he could be "blunt" and "direct," and that he "should aim to be more tactful." (*Id.* at ¶ 316.)

Mr. Isferding observed that young engineers would sit in Mr. Quinn's office to discuss matters for several hours at a time, while Mr. Quinn never had time to answer his questions. (*Id.* at ¶ 317; Def.Proposed Findings of Fact ¶ 99.) Mr. Isferding and Mr. Jones were excluded from distributor meetings in 1990 and 1991; the younger Application Engineers, however, were invited. (Pl.Resp. to Def.Proposed Findings of Fact ¶ 318.) Mr. Isferding had participated in such meetings prior to 1991. (*Id.*) He never inquired as to why he was not invited. (Def. Proposed Findings of Fact ¶ 100.) Mr. Isferding spoke with Mr. Jones and Mr. Hagen about the treatment they were receiving from Mr. Quinn; they concluded that Mr. Quinn

"just didn't want to get involved with the older people." (Pl.Resp. to Def.Proposed Findings of Fact ¶ 320.) Mr. Isferding was also offended that he was not individually invited to a company picnic in the fall of 1990. (Def.Proposed Findings of Fact ¶ 101.)

*1447 In July of 1991, the Application Department was reorganized; Mr. Quinn was promoted to Manager of Engineering, taking with him three young engineers, and Mr. Hagen and Mr. Isferding, the two oldest engineers, were transferred to the parts department as customer service representatives, reporting to Gary Wichtel. (*Id.* at ¶ 324; Def.Proposed Findings of Fact ¶ 102.) The parties dispute whether this constituted a demotion. (*Id.* at ¶¶ 102–104; Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 324–325.) Mr. Hagen and Mr. Isferding were given responsibility for taking parts orders, a function handled prior to reorganization by clerical people in the parts department; they were no longer involved in the sizing of equipment, a duty transferred to the engineers in Mr. Quinn's department and done primarily by computers. (*Id.* at ¶ 325–326; Def.Proposed Findings of Fact ¶ 106.) Prior to the reorganization, Mr. Isferding had manually performed the sizing of screens; the plaintiffs claim that afterwards, even though he no longer had this duty, he was nonetheless required to train the younger engineers on how to perform this function. (Pl.Resp. to Def.Proposed Findings of Fact ¶ 327.) Mr. Isferding's salary did not change as a result of the reorganization, and he no longer had contact with Mr. Quinn. (Def.Proposed Findings of Fact ¶¶ 103, 108–109.) Unlike Mr. Quinn, Mr. Wichtel never screamed at Isferding or other employees. (*Id.* at ¶¶ 110–111.)

Mr. Isferding claims that after the reorganization, he could see no future with the company, his job had become unbearable because of the harassment and the demotion of himself and other older employees, and he believed he would be fired. (Pl.Resp. to Def.Proposed Findings of Fact ¶ 330.) After three weeks in the Parts Department, Mr. Isferding gave Mr. Wichtel verbal notice that he would be leaving the company in October of 1991. (*Id.* at ¶ 331; Def.Proposed Findings of Fact ¶ 112.) Mr. Isferding and his wife had planned to stay in Wisconsin for at least two more years while she finished her schooling. (Pl.Resp. to Def.Proposed Findings of Fact ¶ 332.) He did not advise anyone in management that he was being forced out; according to him, he "was kind of humiliated and [ ] felt bad, [and] didn't want to have to tell them that after [his] years of service that they would do something like this to [him]." (*Id.* at ¶ 333; Def.Proposed Findings of Fact ¶ 116.) Before leaving, Mr. Isferding trained another employee to perform his duties; the defendants indicate that his position was not refilled, while the plaintiffs claim that he was replaced by Randall Fischer, age thirty-five (35). (*Id.* at ¶ 113; Pl.Resp. to Def.Proposed Findings of Fact ¶ 337.) An in-house retirement party was held for him on his last day and he received several gifts. (*Id.* at ¶ 336; Def.Proposed Findings of Fact ¶ 114.) Mr. Isferding was sixty-four (64) years of age when he left employment with SI. (*Id.* at ¶ 115.) The company did not give him an exit interview before he left. (Pl.Resp. to Def.Proposed Findings of Fact ¶ 335.)

When Mr. Isferding left SI, Mr. Wichtel recommended to Mr. Guernsey that SI's Nitro facility in West Virginia use him for consulting work; Mr. Isferding had previously worked for Nitro, was very interested in working there again, and did not want to jeopardize that opportunity. (*Id.* at ¶ 334.) After building a house on land they owned, he and his wife moved to West Virginia in January of 1992. (*Id.* at ¶ 338.) Mr. Isferding has sought employment since leaving SI. (*Id.* at ¶ 339.)

In the late summer or early fall of 1992, Mr. Isferding received two phone calls from Rita Burns of the EEOC; he did not tell her that he believed that he had been forced out of the company, that he had been a victim of age discrimination, or that Mr. Quinn's conduct and abusive language were age-related or affected his decision to leave SI. (*Id.* at ¶ 340; Def.Proposed Findings of Fact ¶¶ 117–121.) According to Mr. Isferding, he kept these beliefs to himself out of embarrassment and to save face. (Pl.Resp. to Def.Proposed Findings of Fact ¶ 340.) After he spoke with the EEOC, he discussed the matter with his wife and "began to put the pieces together and view more clearly all that had happened." (*Id.* at ¶ 341; Def.Proposed Findings of Fact ¶ 122.)

*1448 4. ***Robert Jones:***

Plaintiff Robert Jones was born on August 20, 1930, and joined Allis–Chalmers of Canada in 1955. (Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 232–233.) Except for a four-month period in 1965, Mr. Jones worked continuously for Allis–Chalmers and its successors from 1955 until May 31, 1991. (*Id.* at ¶ 234.) In 1975, Mr. Jones transferred from Canada to Appleton because he was looking for "more responsibilities," "more challenges," and he wanted to "improve his position"; he accepted the position of Senior Project Application Engineer. (*Id.* at ¶ 235; Def.Proposed Findings of Fact ¶ 124.) Mr. Jones specialized in primary gyratory crushers, which cost several million dollars each. (Pl.Resp. to Def.Proposed Findings of Fact ¶ 236.)

From 1985 until he left SI, Mr. Jones was supervised by Mr. Quinn. (*Id.* at ¶ 237; Def.Proposed Findings of Fact ¶

125.) During his 1987 performance review, Mr. Jones claims that Mr. Quinn told him that he thought Mr. Jones was only putting in time until retirement; Mr. Jones, insulted, told Mr. Quinn that that was not true. (Pl.Resp. to Def.Proposed Findings of Fact ¶ 238.)

According to the plaintiffs, after Mr. Guernsey became general manager of Appleton in November of 1989, Mr. Quinn's behavior toward Mr. Jones became very abusive; Mr. Jones was subjected to outbursts from Mr. Quinn at the rate of approximately twice a month. (*Id.* at ¶ 239; Def.Proposed Findings of Fact ¶¶ 128–129.) Mr. Quinn would yell, scream, belittle, and swear at Mr. Jones in front of others; he pounded his desk, and kicked filing cabinets; and he would fly into a rage over a minor incident or when Mr. Jones asked for clarification. (Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 240–241.) On one such occasion, Mr. Quinn purportedly "flew into a rage" over questions of freight charges; in another incident, Mr. Quinn yelled at Mr. Jones at the coffee machine after Mr. Jones prepared a chronological list of events occurring on a project with SI's sister company in Australia. (*Id.* at ¶ 242.) On another occasion, Mr. Quinn demonstrably rebuked Mr. Jones for adopting a different method than suggested in doing a feed analysis; in another incident, Mr. Quinn "went into a rage" when Mr. Jones asked the manager of Svedala in Canada to assist him in allocating freight costs in returning a primary crusher. (*Id.*)

Other employees witnessed this behavior toward Mr. Jones; for example, Mr. Spoonamore overheard Mr. Quinn yell at Mr. Jones "You dumb son-of-a-bitch, what are you doing there" and kick a cabinet, and Mr. Foy and Mr. Gregor observed Mr. Quinn act abusive toward Mr. Jones, Mr. Isferding, Mr. Flavel, Mr. Hagen, and other older employees. (*Id.* at ¶¶ 258, 260–263, 266.) When Mr. Gregor told Mr. Quinn that he was acting inappropriately, Mr. Quinn was surprised, wanted to know which employees were complaining about him, and indicated that he did not intend on changing his approach. (*Id.* at ¶ 265.) Mr. Jones also observed Mr. Quinn exhibit similar behavior toward other older employees, including Mr. Hagen and Mr. Isferding, but not toward younger engineers; he believed the severity of these outbursts to be unwarranted and unprofessional. (*Id.* at ¶¶ 249, 270; Def.Proposed Findings of Fact ¶¶ 130–131.) While the defendants claim that Mr. Jones did not report Mr. Quinn's conduct to anyone at SI, the plaintiffs argue that Mr. Jones spoke to Mr. Foy about it, and that SI management, including Mr. Guernsey and Mr. Platner, had knowledge of Mr. Quinn's abusive behavior toward Mr. Jones. (*Id.* at ¶ 132; Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 259, 266–268.) During his performance review, Mr. Quinn was told that he could be "blunt" and "direct," and that he "should aim to be more tactful." (*Id.* at ¶ 269.)

Mr. Quinn testified that Mr. Jones' performance was satisfactory. (*Id.* at ¶ 243.) Mr. Jones found performance reviews by Mr. Quinn to be very uncomfortable and intimidating, with Mr. Quinn raising his voice and making negative remarks. (*Id.* at ¶ 248.) Mr. Jones did not discuss his performance evaluations with Mr. Quinn. (Def. Proposed Findings of Fact ¶ 133.) During his 1989 performance review, Mr. Quinn asked Mr. Jones whether he had any plans to retire. (*Id.* at ¶ 126; Pl. Resp. to Def. Proposed Findings of Fact ¶ 244.) Mr. Jones told Mr. ***1449** Quinn that he would stay as long as possible, and that he would give one year's notice if he intended to retire. (*Id.;* Def. Proposed Findings of Fact ¶ 127.) Mr. Jones did not tell Mr. Quinn his career goals; nevertheless, Mr. Quinn wrote on Mr. Jones' 1989 performance review that his "long-range career objective" was to "finish [his] career at Boliden–Allis." (Pl. Resp. to Def. Proposed Findings of Fact ¶ 245.) Even though Mr. Jones never gave Mr. Quinn a specific retirement date, Mr. Quinn wrote to Mr. Guernsey in response to the latter's December 22, 1989 request for the projected retirement date for Mr. Jones, Mr. Isferding and Mr. Hagen that "all my people underlined in red plan on going till 65!" (*Id.* at ¶ 246.) In Mr. Jones' performance review for the calendar year 1990, which was given to him during a meeting in January of 1991, Mr. Quinn wrote down as his long-term career objective: "organize and publish gyratory crusher information for future generations"; Mr. Jones had not given any indication that he intended to retire or otherwise leave the company. (*Id.* at ¶ 247.)

Mr. Jones and the other older engineers also felt that the younger engineers received favorable treatment and more individualized attention from Mr. Quinn. (*Id.* at ¶¶ 250, 256.) For example, when an application conference regarding hydrocones was held in Sweden, SI sent the two youngest project engineers from the Application Department, even though one had been in the department for only one month. (*Id.* at ¶ 252.) In addition, while Mr. Jones and Mr. Isferding had in the past participated in SI's annual two-day meeting in Appleton for its distributors, they were not invited to the meetings during their last two years, even though the younger engineers were, in fact, invited. (*Id.* at ¶ 253.) Mr. Quinn also refused to allow Mr. Jones to take an extra day of vacation, instead docking him a day of pay, when Mr. Jones was one day late in returning from a vacation because of a snow storm in Appleton; that same day, SI closed its office and sent all of its employees home with pay because of the weather. (*Id.* at ¶ 251.) When Mr. Jones mentioned to Mr. Hagen that Mr. Quinn was pretty hard on him, Mr. Hagen responded: "Oh, I'm the same, I have the same problem, I just think he has something against older people"; Mr. Isferding shared this conclusion. (*Id.* at ¶ 255–256.)

Mr. Jones believed that the treatment he was receiving from Mr. Quinn was part of a company-wide policy implemented when Mr. Guernsey was hired to force out older employees. (*Id.* at ¶ 271.) Mr. Jones found Mr. Quinn's treatment distressing, and believes that it affected his health and disposition. (*Id.* at ¶ 272.) In early to mid-February of 1991, Mr. Jones asked Mr. Quinn if they could talk; after Mr. Quinn responded that "you've got 30 seconds," Mr. Jones stated that he was leaving. (*Id.* at ¶ 273; Def. Proposed Findings of Fact ¶¶ 134–135.) At about noon that day, Mr. Quinn asked Mr. Jones if he would mind if Mr. Quinn announced his retirement to the rest of the staff at the three o'clock department meeting; Mr. Jones reluctantly agreed. (Pl. Resp. to Def. Proposed Findings of Fact ¶ 274.) At that meeting, Mr. Quinn announced that Mr. Jones was leaving and invited Mr. Jones to state the reasons; Mr. Jones, reluctant to recite Mr. Quinn's abusive treatment, indicated that he wished to pursue other interests, was interested in working as a consultant for SI, and intended to eventually move to Colorado to be closer to his daughters. (*Id.*; Def. Proposed Findings of Fact ¶¶ 136–137.) Mr. Jones had no further discussions with Mr. Quinn or Mr. Stelter regarding his reasons for leaving; after the meeting, Alice Cordes, the department secretary, told Mr. Jones that he did not have to let Mr. Quinn "push him out." (Pl. Resp. to Def. Proposed Findings of Fact ¶¶ 275–276.)

After Mr. Jones' retirement announcement, Mr. Quinn's abusive behavior towards him allegedly stopped. (*Id.* at ¶ 277.) Against his wishes, Ms. Cordes organized a retirement party for him; Mr. Jones (unsuccessfully) instructed her not to invite Mr. Quinn, and forty (40) to fifty (50) Appleton employees attended. (*Id.* at ¶ 279; Def. Proposed Findings of Fact ¶ 139.) Mr. Jones did not tell anyone before he left that he felt he had been forced out because of harassment and age discrimination; he claims that he did not want to jeopardize any opportunity ***1450** to do consulting work for SI. (Pl. Resp. to Def. Proposed Findings of Fact ¶ 278.)

Mr. Jones retired on May 31, 1991, at age sixty (60). (Def. Proposed Findings of Fact ¶¶ 138, 140.) While he was not individually replaced, his duties were spread among several employees, including Carol Cihak, Mr. Isferding, Mr. Hagen, Randy Fischer, and Sherry McGlin. (*Id.* at ¶ 141; Pl. Resp. to Def. Proposed Findings of Fact ¶ 281.) After Mr. Jones left SI, Mr. Gregor purportedly told him that "no matter what you did, you didn't have a chance, [Quinn] was out to get you." (*Id.* at ¶ 280.) Mr. Jones subsequently sold his house in Appleton and moved to Colorado where his son and two daughters live. (Def. Proposed Findings of Fact ¶ 142.) Mr. Jones talked with a number of individuals and companies regarding consulting work; he did some consulting work after his departure from Appleton for Allis–Chalmers Canada and Iron Ore Company of Canada. (Pl. Resp. to Def. Proposed Findings of Fact ¶¶ 288–289.) He is currently employed as a downhill ski instructor in Frisco, Colorado. (*Id.* at ¶ 290; Def. Proposed Findings of Fact ¶ 143.) He cross-country skis approximately eight (8) hours a week and participates in ski races during the winter, and bikes approximately ten (10) hours a week during the summer. (*Id.* at ¶ 144; Pl. Resp. to Def. Proposed Findings of Fact ¶ 291.)

Mr. Jones filed a charge of age discrimination with the EEOC on December 2, 1991, approximately seven months after he left SI, alleging that Mr. Quinn's harassment forced him to leave. (*Id.* at ¶ 282; Def. Proposed Findings of Fact ¶ 145.) Upon learning of Mr. Jones' charge, Mr. Stelter contacted Mr. Jones to discuss reemployment, offering him his job back at his prior salary. (*Id.* at ¶ 146; Pl. Resp. to Def. Proposed Findings of Fact ¶ 283.) According to the plaintiffs, Mr. Jones received no assurances from Mr. Stelter that Mr. Quinn's behavior had changed, or that anyone had talked to Mr. Quinn about his abusive behavior; instead, Mr. Jones was told "you'll have to work this out with Pat Quinn, he doesn't hold a grudge against you." (*Id.* at ¶ 284.) The defendants, however, indicate that Mr. Stelter offered to set up a meeting with Mr. Quinn to discuss the prior problems, offered Mr. Jones the opportunity to work full or part time, and advised Mr. Jones that he would report to Mr. Thomas rather than Mr. Quinn if he agreed to return. (Def. Proposed Findings of Fact ¶¶ 147–149.) According to the defendants, Mr. Jones did not accept reinstatement because he and his wife were eager to move to Colorado. (*Id.* at ¶ 150.) The plaintiffs, however, claim that, while Mr. Jones was eager to return to SI, he was uncomfortable having to continue working with Mr. Quinn, and feared that the offer was simply being made so that he would drop his EEOC charges. (Pl. Resp. to Def. Proposed Findings of Fact ¶¶ 285–286.)

5. *Major Coxhill:*

Plaintiff Major Coxhill began his career with Allis–Chalmers in 1964; although he left the company briefly to work for another business, he worked there cumulatively for twenty-four (24) years and worked in the Engineering Department of the Appleton unit since 1972. (Pl. Resp. to Def. Proposed Findings of Fact ¶ 342.) Mr. Coxhill became Manager of Engineering for the Appleton unit, and a first report to the general manager, in 1986; he remained in this position when Mr. Guernsey replaced Mr. Farnsworth as general manager in November of 1989. (*Id.* at ¶¶ 343, 346; Def. Proposed Findings of Fact ¶ 151.)

Prior to 1989, Mr. Coxhill received very positive

performance reviews from Mr. Farnsworth. (Pl. Resp. to Def. Proposed Findings of Fact ¶ 345.) In late 1989 or early 1990, Mr. Guernsey informed Mr. Quinn that he would replace Mr. Coxhill as Manager of Engineering; Mr. Guernsey had been in his position for only several months, had conducted no formal performance review of Mr. Coxhill, and had not indicated in any way that Mr. Coxhill's performance was not acceptable. (*Id.* at ¶¶ 347–348.) In February of 1990, Mr. Guernsey reviewed Mr. Coxhill's performance for 1989, giving him a very favorable performance rating and assuring him that, although some management changes might be made, his job was not in jeopardy. (*Id.* at ¶ 349.) Mr. Guernsey did not inform Mr. Coxhill that he had already told Mr. Quinn that Mr. Quinn would be ***1451** replacing Mr. Coxhill as Manager of Engineering. (*Id.* at ¶ 350.)

In approximately May of 1990, Mr. Guernsey asked Mr. Coxhill to prepare information for SIAB management regarding the individual and average ages of each of the employees in the Engineering Department. (*Id.* at ¶ 351.) In response to this request, Mr. Coxhill prepared an organizational chart which showed the name, birth date, and years of service of each employee in the Engineering Department as well as the average age of all employees in the department; the chart was presented by Mr. Coxhill to Swedish management of SIAB at an international product meeting held in Brazil that month. (*Id.* at ¶ 352.) The chart revealed that Mr. Coxhill, at age sixty (60), was the oldest member of the department. (*Id.* at ¶¶ 352–353.) In approximately November of 1990, Mr. Guernsey, along with members of management at Appleton, attended a conference in Sweden regarding product development; while Mr. Coxhill would normally have attended such a meeting, he was told by Mr. Guernsey not to attend. (*Id.* at ¶ 354.) At the conference, Mr. Guernsey told SIAB management that he wanted to "give Major a rest" and that Mr. Coxhill would be removed from his position as Manager of Engineering. (*Id.* at ¶ 355.)

In February of 1991, Mr. Coxhill received a review of his performance in 1990; Mr. Guernsey rated him a 2–plus, but told Mr. Coxhill that he rated all of his managers stringently and that Mr. Coxhill should not worry about it, and did not tell Mr. Coxhill that his performance was unacceptable or that he was in jeopardy of losing his position. (*Id.* at ¶¶ 356–357, 359.) Mr. Coxhill believed that this rating was unfair and unjustified, and expressed his objections. (*Id.* at ¶ 358.)

On April 1, 1991, Mr. Guernsey summoned Mr. Coxhill to his office, and informed him that, as part of a departmental reorganization, he was being removed from his position as Manager of Engineering, and replaced by Mr. Quinn. (*Id.* at ¶ 361; Def. Proposed Findings of Fact ¶ 152, 156.) According to Mr. Coxhill, Mr. Guernsey then asked him whether he had considered retirement, and told him that Mr. Stelter was "standing by" to discuss with him that option; Mr. Guernsey then instructed Mr. Coxhill to take the rest of the day off from work to consider his options. (Pl. Resp. to Def. Proposed Findings of Fact ¶ 362; Def. Proposed Findings of Fact ¶ 164.) Mr. Guernsey also purportedly told Mr. Coxhill that he was going to prepare an announcement regarding the job change, and asked Mr. Coxhill whether he would like to "fluff it up." (Pl. Resp. to Def. Proposed Findings of Fact ¶ 363.) According to Mr. Coxhill, he had no interest in retiring and was not told that he would be reassigned to another position or given any other job at Appleton. (*Id.* at ¶¶ 364–365, 367.) Mr. Coxhill was not told that he was being terminated. (Def. Proposed Findings of Fact ¶ 166.) Mr. Coxhill met with Mr. Stelter as instructed, told him he did not wish to retire, and took the remainder of the day off. (Pl. Resp. to Def. Proposed Findings of Fact ¶¶ 366–368.) Mr. Coxhill claims that he was given no other alternative from Mr. Guernsey other than retirement, and believed that he would be fired if he did not retire. (*Id.* at ¶¶ 369–370.) At no time prior to this meeting had Mr. Coxhill been informed by Mr. Guernsey or any other senior manager of SI that his performance was unsatisfactory or that his position was in jeopardy. (*Id.* at ¶ 372.)

The next day, Mr. Coxhill called Mr. Platner; while the plaintiffs indicate that he informed Mr. Platner that he was very angry and considering legal action, the defendants claim that he did not indicate to Mr. Platner that he believed he had been discriminated against on the basis of age. (*Id.* at ¶¶ 373–374; Def. Proposed Findings of Fact ¶ 157.) Mr. Coxhill then left Appleton for a short vacation. (Pl. Resp. to Def. Proposed Findings of Fact ¶ 375.) On April 3, 1991, Mr. Guernsey issued a company-wide memorandum announcing various changes in the organizational structure of the Appleton unit, including Mr. Coxhill's replacement as Manager of Engineering by Mr. Quinn. (*Id.* at ¶ 376.) When Mr. Coxhill returned, Mr. Guernsey advised him that the company had a new assignment for him as Chief Engineer of Product Quality; although Mr. Coxhill considered this to be a "concocted" position ***1452** and a demotion, and believed that it prevented him from competing for other positions in the company including Business Manager (a position he admits ideally required skills he did not possess), his salary did not change and he retained the same benefits and bonus plan. (*Id.* at ¶¶ 377–379, 382–383; Def. Proposed Findings of Fact ¶¶ 153–155; Def. Reply to Pl. Resp. to Def. Proposed Findings of Fact ¶ 382.) As Manager of Engineering, Mr. Coxhill had supervisory responsibility over thirty (30) engineers, and was a first report to the general manager; as Chief Engineer of Product Quality, Mr. Coxhill had no supervisory responsibility over any

engineers, was no longer a first report to the general manager, and no longer participated in senior management staff meetings. (Pl. Resp. to Def. Proposed Findings of Fact ¶¶ 380–383.)

According to Mr. Coxhill, this series of events left him devastated and humiliated, and mistrustful of SI management. (*Id.* at ¶ 384.) In addition, he claims that he observed a pattern of discrimination against himself and other older employees at Appleton, and believed that he would be fired. (*Id.* at ¶¶ 385–386.) Mr. Coxhill informed others in the company, including Mr. Danielson, Mr. Brock, and Mr. Bandholz, that he believed that he was being discriminated against on the basis of age and that his demotion was the result of age discrimination. (*Id.* at ¶ 387.) While on a business trip in France in July of 1991, Mr. Coxhill was told by Arvid Svensson, one of the managers of engineering for SIAB in Sweden, that he was sorry to have heard that Mr. Coxhill lost his position and that he had been aware of the change since November of 1990, when he and other SIAB managers had been told by Mr. Guernsey that he was going to "give Major a rest" by replacing him with Mr. Quinn. (*Id.* at ¶¶ 388–391; Def. Proposed Findings of Fact ¶ 165.) According to Mr. Coxhill, this reinforced his view that Mr. Guernsey wanted him to retire all along, and that he was being discriminated against on the basis of his age. (Pl. Resp. to Def. Proposed Findings of Fact ¶¶ 391–392.)

After Mr. Spoonamore was fired in June of 1991, Mr. Coxhill was asked to take on additional responsibilities as Field Service Manager. (*Id.* at ¶ 393; Def. Proposed Findings of Fact ¶ 158.) Mr. Valitchka indicated to Mr. Coxhill several times that someone with his skills was needed in the position. (*Id.* at ¶ 159.) According to Mr. Coxhill, this position would have further removed him from engineering activities, would not have allowed him to utilize his experience and expertise as an engineer, and would have taken him further away from the management track of the company; therefore, he denied the request. (Pl. Resp. to Def. Proposed Findings of Fact ¶ 393.) In October of 1991, Mr. Coxhill met with Mr. Guernsey and was again asked to consider the position of Field Service Manager; he viewed this as another demotion, but nevertheless accepted the job. (*Id.* at ¶ 394–395, 404–406; Def. Proposed Findings of Fact ¶ 160.) The parties dispute whether Mr. Coxhill remained in his previous position as Chief Engineer of Product Quality. (*Id.* at ¶ 160; Pl. Resp. to Def. Proposed Findings of Fact ¶ 396–397.) Mr. Coxhill was told that he would be reporting directly to Mr. Valitchka. (*Id.* at ¶ 399.)

On January 1, 1992, SI again reorganized its Appleton unit, and Mr. Coxhill began reporting to Mr. Quinn. (*Id.* at ¶¶ 400–401; Def. Proposed Findings of Fact ¶ 161.) Mr. Quinn had a reputation at SI for abusive behavior, and had previously been abusive towards Mr. Coxhill; Mr. Coxhill did not want to work with or report to Mr. Quinn because he considered Mr. Quinn's conduct to be unprofessional, even though he recalls only one incident where Mr. Quinn used abusive language towards him. (*Id.* at ¶ 163; Pl. Resp. to Def. Proposed Findings of Fact ¶¶ 402–403.) According to Mr. Coxhill, his role and responsibility at SI continued to diminish, and any efforts on his part to become involved in engineering or management would be futile. (*Id.* at ¶ 408.)

During 1990 and 1991, Mr. Coxhill witnessed the termination or departure of senior managers or employees who had been his colleagues and had been employed by SI or its predecessors for many years, including Mr. Weiss, Mr. Flavel, Mr. Gregor, Mr. Conradt, Mr. Bandholz, and Mr. Danielson. (*Id.* at ¶ 407.) Mr. Coxhill concluded that SI was ***1453** engaged in age discrimination and that such discrimination had been and was being directed against him, and that he may be fired in the future. (*Id.* at ¶ 410.) In May of 1992, Mr. Coxhill advised Mr. Quinn that he was retiring from SI. (*Id.;* Def. Proposed Findings of Fact ¶ 167–168.) Mr. Coxhill did not tell anyone that he was voluntarily retiring, and only indicated that he was leaving SI. (Pl. Resp. to Def. Proposed Findings of Fact ¶ 411, 413.) Mr. Coxhill was sixty-one (61) when he retired, and had worked at SI and its predecessors for almost twenty (20) years. (*Id.* at ¶ 412; Def. Proposed Findings of Fact ¶ 169.) Soon after he had spoken with Mr. Quinn, Mr. Stelter approached Mr. Coxhill and indicated that his departure would leave a big gap in the organization and that he could still change his mind about leaving. (*Id.* at ¶ 170.) In August of 1992, a retirement party was held for Mr. Coxhill. (*Id.* at ¶ 171; Pl. Resp. to Def. Proposed Findings of Fact ¶ 412.)

During his employment at SI, Mr. Coxhill complained about the employment actions that were being taken, objected to what he perceived to be age discrimination, and objected to his job changes. (*Id.* at ¶ 414.) He did not, however, tell anyone that he was being forced to retire. (Def. Proposed Findings of Fact ¶ 172.) Since leaving SI, Mr. Coxhill has been actively seeking other employment. (Pl. Resp. to Def. Proposed Findings of Fact ¶ 415.) He did not file a charge of discrimination with the EEOC. (Def. Proposed Findings of Fact ¶ 174.)

6. *James Conradt:*

Plaintiff James Conradt was born on February 19, 1937. (Pl. Resp. to Def. Proposed Findings of Fact ¶ 416.) He started with Allis–Chalmers in Appleton in 1958 as an

employee in the accounting department; he transferred to human resources, where he was employed from 1972 to 1990. (*Id.* at ¶ 417.) In 1986, he was promoted to Manager of Human Resources for the Appleton unit, a senior management position with "first report" responsibility to the general manager; he remained in this position when Mr. Guernsey arrived in November of 1989. (*Id.* at ¶ 418; Def. Proposed Findings of Fact ¶¶ 175–176.) In this position, Mr. Conradt participated in senior staff management meetings and was responsible for formulating and implementing human resources and employment policies and practices for the Appleton unit. (Pl. Resp. to Def. Proposed Findings of Fact ¶ 419.) He also negotiated union contracts and maintained compliance with state and federal laws and regulations. (*Id.*)

After the Appleton and Milwaukee facilities were acquired by SIAB from Allis–Chalmers, Mr. Conradt began to observe things which indicated to him that SIAB had employment practices that discriminated against older workers and favored younger workers. (*Id.* at ¶ 420–421.) Mr. Conradt reviewed the annual statement of Trelleborg AB, the predecessor of SIAB, and observed that the document contained the ages of directors and senior managers; he also observed that many of the managers were in their early or mid thirties. (*Id.* at ¶ 422.) He received information about SIAB's employment policies and practices in 1989 and 1990 from Bruce Merten, who was then the human resources manager for the Milwaukee unit and SI. (*Id.* at ¶ 423.) Mr. Merten and Mr. Conradt communicated regularly about human resources issues, policies and practices; they discussed Swedish management's emphasis on the age of its employees, and the favoring of younger employees over older ones. (*Id.* at ¶ 424.) According to Mr. Conradt, Mr. Merten told him directly that Swedish management had a policy favoring younger workers. (*Id.* at ¶ 425.) Mr. Gregor told Mr. Conradt that, during his interview in Sweden for the general manager position at Appleton, he was told that SIAB wanted to hire someone young, preferably in his thirties. (*Id.* at ¶ 426.) Mr. Merten also purportedly told him that another candidate for that position had been rejected because he was too old. (*Id.* at ¶ 427.) Mr. Guernsey, age thirty-seven (37), was eventually hired; the three candidates recommended by Mr. Farnsworth, Mr. Gregor, age forty-five (45), Mr. Weiss, age fifty-four (54), and Mr. Foy, age forty-eight (48), were not selected. (*Id.* at ¶ 428.)

Mr. Guernsey implemented several practices and procedures that were different from ***1454** those utilized by Mr. Farnsworth; Mr. Conradt was not comfortable with Mr. Guernsey's style and believed him to be a poor communicator, as he did not consult Mr. Conradt or involve him in certain decisions to the extent he desired. (Def. Proposed Findings of Fact ¶¶ 177–178, 181.) In the fall of 1989, Mr. Merten instructed Mr. Conradt to calculate the average age of the salaried employees at the Appleton unit; Mr. Conradt had never before been asked to conduct this type of calculation, and was concerned that the information may be used inappropriately. (Pl. Resp. to Def. Proposed Findings of Fact ¶ 429.) In late 1989, Mr. Conradt became aware, as a result of discussions with Mr. Merten, that SI was going to conduct a management conference at a conference center near Chicago. (*Id.* at ¶ 430.) According to Mr. Conradt, he was told that this conference was only for the "young" and up and coming managers, and he was aware that the age of SI employees had been a factor in the process of selecting attendees; the only person selected to attend from Appleton was Mr. Quinn, a young manager in his thirties. (*Id.* at ¶¶ 430–431.)

Mr. Guernsey asked Mr. Conradt to investigate the possibility of having certain Appleton employees attend MBA classes at a college near Appleton. (*Id.* at ¶ 432.) Later, Mr. Guernsey indicated that the only two people he was considering for the program were Mr. Quinn and Mark Geyer, both in their thirties. (*Id.* at ¶¶ 432–433.) In December of 1989, Mr. Conradt prepared a list of employees who were sixty (60) or older, identified as employees who were potentially going to retire; Mr. Conradt had gathered such information in previous years. (*Id.* at ¶ 434.) According to Mr. Conradt, Mr. Guernsey used the list to ask senior managers to specifically find out when those individuals planned to retire; he believed that this use departed substantially from the use to which this information had been put in the past by Mr. Farnsworth, and that it was used to pressure older employees to leave the company. (*Id.* at ¶¶ 435–436.) On December 15, 1989, after Mr. Conradt had provided Mr. Guernsey with information regarding employees' names and ages, Mr. Guernsey told him that "we've got an awful lot of long service employees. We need to get some young—ah, new blood into the organization." (*Id.* at ¶ 437.) Mr. Conradt made a handwritten note of the conversation to record verbatim Mr. Guernsey's statement, and believed that Mr. Guernsey intended to get rid of long-term employees, including himself. (*Id.* at ¶ 438, 448.)

In February of 1990, after being involved in several meetings, Mr. Conradt was informed by Mr. Guernsey that SI was going to terminate Mr. Weiss. (*Id.* at ¶ 439; Def. Proposed Findings of Fact ¶ 182.) Mr. Guernsey indicated to Mr. Conradt, and then to Mr. Weiss, that Mr. Weiss was being terminated because "he doesn't fit in." (*Id.* at ¶ 183.) Mr. Conradt was aware that Mr. Weiss had not received any negative performance reviews and that his performance had not been formally reviewed by Mr. Guernsey. (Pl. Resp. to Def. Proposed Findings of Fact ¶ 440.) Mr. Conradt believed this action to be the

implementation of a program to get rid of older, longer term employees. (*Id.* at ¶ 441.) In a meeting with Mr. Guernsey, Mr. Conradt stated that the termination of Mr. Weiss was a terrible mistake, was discriminatory, and was wrong. (*Id.* at ¶ 442; Def. Proposed Findings of Fact ¶ 186.) Mr. Guernsey purportedly responded "I've decided to terminate him and you have two choices, you do as I tell you or there is the door." (*Id.* at ¶ 187; Pl. Resp. to Def. Proposed Findings of Fact ¶ 443.) Mr. Guernsey did not indicate to Mr. Conradt that older employees did not fit in, or that Mr. Weiss was (or was not) terminated because of his age. (*Id.* at ¶ 444; Def. Proposed Findings of Fact ¶¶ 184–185.) Prior to the day Mr. Weiss was terminated, Mr. Conradt attended a meeting with Mr. Guernsey and an out-placement consultant who was retained by SI to provide employment counseling for Mr. Weiss after the termination; during this meeting, Mr. Guernsey stated that the company was concerned that the termination of Mr. Weiss would result in some type of legal action or age discrimination claim, and the outplacement consultant promised to strongly advise Mr. Weiss against filing a lawsuit. (Pl. Resp. to Def. Proposed Findings of Fact ¶ 445.)

***1455** Mr. Conradt was concerned in early 1990 that he would be terminated as a result of his age. (*Id.* at ¶¶ 449, 453.) In December of 1989, Mr. Conradt was given incorrect information pertaining to a benefits presentation for employees at SI plants in Pennsylvania and Kansas; as a result, he told several hundred employees at the facilities the wrong information about their benefits. (*Id.* at ¶ 451.) Mr. Guernsey reprimanded him, telling him it was his responsibility to know that the information was wrong even though it was provided by Mr. Merten. (*Id.*) In February of 1990, Mr. Guernsey criticized Mr. Conradt for negotiating union contracts previously approved by Mr. Farnsworth. (*Id.* at ¶ 450.) According to Mr. Conradt, his job responsibilities were being downgraded and reduced as of early 1990. (*Id.* at ¶ 452; Def.Proposed Findings of Fact ¶ 179.) While the defendants claim that Mr. Conradt only told Mr. Guernsey about this belief, the plaintiffs indicate that he complained to Mr. Merten. (*Id.* at ¶ 180; Pl.Resp. to Def.Proposed Findings of Fact ¶ 455.) Mr. Guernsey expressed dissatisfaction with Mr. Conradt's performance and was actively seeking a replacement for him. (*Id.* at ¶ 454.) According to Mr. Conradt, he was also concerned about being forced to participate in "illegal and immoral" employment discrimination policies involving Mr. Weiss and other older employees, and feared personal liability for carrying out such policies despite his objections. (*Id.* at ¶¶ 455–459.)

Mr. Conradt decided to leave SI shortly after Mr. Weiss was terminated; at the end of March of 1990, he gave notice of his intention to leave the company. (Def.Proposed Findings of Fact ¶¶ 188, 190.) Mr. Conradt did not tell co-workers that he was voluntarily leaving his employment with SI. (Pl.Resp. to Def.Proposed Findings of Fact ¶ 460.) Mr. Conradt felt he had no choice but to leave SI, even though he enjoyed his work and wanted to continue his employment; however, he acknowledges that he was not fired. (*Id.* at ¶¶ 459, 461; Def.Proposed Findings of Fact ¶ 191.) When Mr. Guernsey asked him why he was retiring, Mr. Conradt did not tell him that he was the victim of age discrimination. (*Id.* at ¶ 192.) Mr. Conradt was fifty-three (53) years of age when he left his employment at SI; he was replaced by Mr. Stelter, age thirty-nine (39). (Pl.Resp. to Def.Proposed Findings of Fact ¶¶ 462–463.) Mr. Conradt was given a retirement party which was attended by about seventy-five (75) people. (Def.Proposed Findings of Fact ¶ 193.) At the time he made the decision to leave SI, Mr. Conradt anticipated receiving an inheritance under his father's will; he did not know the amount, which totalled approximately $300,000. (*Id.* at ¶ 189; Pl.Resp. to Def.Proposed Findings of Fact ¶ 464.)

Mr. Conradt did not file a charge of discrimination with the EEOC. (Def.Proposed Findings of Fact ¶ 195.) While the defendants claim that he never informed any government agency that SI was engaging in discriminatory practices, the plaintiffs indicate that he did so on December 5, 1991. (*Id.* at ¶ 194; Pl.Resp. to Def.Proposed Findings of Fact ¶ 466.) Mr. Conradt indicates that he did not leave his employment with SI to engage in church work or missionary work. (*Id.* at ¶ 465.) Since leaving SI, he has sought employment as a human resources specialist; when no such employment ensued, he started his own woodworking business. (*Id.*)

II. *LEGAL STANDARD*

[1] [2] Rule 56(c) deems summary judgment appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A genuine issue of fact exists only where a reasonable jury could make a finding in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *Santiago v. Lane,* 894 F.2d 218, 221 (7th Cir.1990). An issue of fact must also be material, as "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson,* 477 U.S. at 248, 106 S.Ct. at 2510.

See also Clifton v. Schafer, ***1456** 969 F.2d 278, 281 (7th Cir.1992); *Local 1545, United Mine Workers of Am. v. Inland Steel Coal Co.,* 876 F.2d 1288, 1293 (7th Cir.1989). The presence of a genuine issue of material fact is to be determined by the substantive law controlling that case or issue. *Anderson,* 477 U.S. at 254–55, 106 S.Ct. at 2513–14; *Santiago,* 894 F.2d at 221. Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine need for trial and summary judgment is proper. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). This standard is "applied with extra rigor in employment discrimination cases, where intent and credibility are crucial issues." *McCoy v. WGN Continental Broadcasting Co.,* 957 F.2d 368, 370–71 (7th Cir.1992). A plaintiff's presentation of more than a scintilla of evidence supporting the existence of an illegitimate motive is enough to preclude summary judgment on an ADEA claim. *Visser v. Packer Eng'g Assoc.,* 909 F.2d 959, 961–62 (7th Cir.1990).

[3] **[4]** The moving party has the initial burden of demonstrating that it is entitled to judgment as a matter of law. *Celotex,* 477 U.S. at 323, 106 S.Ct. at 2552–53; *Local 1545,* 876 F.2d at 1292. Once this burden is met, the non-moving party must "go beyond the pleadings" and designate specific facts to support or defend each element of the cause of action, showing that there is a genuine issue for trial. *Celotex,* 477 U.S. at 322–23, 106 S.Ct. at 2552–53; *Local 1545,* 876 F.2d at 1293. Neither party may rest on mere allegations or denials in the pleadings, *Anderson,* 477 U.S. at 248, 106 S.Ct. at 2510; *Koclanakis v. Merrimack Mut. Fire Ins. Co.,* 899 F.2d 673, 675 (7th Cir.1990), or upon conclusory statements in affidavits, *Palucki v. Sears, Roebuck & Co.,* 879 F.2d 1568, 1572 (7th Cir.1989); *First Commodity Traders, Inc. v. Heinold Commodities, Inc.,* 766 F.2d 1007, 1011 (7th Cir.1985), and both parties must produce proper documentary evidence to support their contentions. *Whetstine v. Gates Rubber Co.,* 895 F.2d 388, 392 (7th Cir.1990); *Local 1545,* 876 F.2d at 1293. In deciding a summary judgment motion, the Court must view the record in the light most favorable to the non-moving party, and all reasonable inferences shall be drawn in that party's favor. *Matsushita,* 475 U.S. at 587, 106 S.Ct. at 1356; *Santiago,* 894 F.2d at 221. A court need not draw every inference from the record, only reasonable inferences. *Local 1545,* 876 F.2d at 1292–93; *Spring v. Sheboygan Area Sch. Dist.,* 865 F.2d 883, 886 (7th Cir.1989).

III. *DISCUSSION*

A. *PARTIES' ARGUMENTS:*

1. *Plaintiffs Ronald Weiss, Malcolm Flavel and Richard Spoonamore:*

The defendants argue that, to prevail on their ADEA claim, each plaintiff must show that SI would not have fired him "but for" the motive to discriminate on the basis of age. According to the defendants, "[t]he undisputed facts in this case demonstrate that age had nothing to do with any of these three involuntary terminations." They contend that Mr. Weiss, age fifty-four (54), was terminated in early 1990 because Mr. Guernsey found his performance, including his purported inability to embrace TQM principles, to be unacceptable; he was replaced by Mr. Dircks, a forty-nine (49) year old former colleague of Mr. Guernsey's at Consolidated Diesel. The defendants also indicate that, although Mr. Guernsey was not entirely satisfied with Mr. Flavel's performance, he was terminated in late 1990 because the decision was made to eliminate his position by assigning international marketing functions to Minco International AB ("Minco"), SIAB's foreign subsidiary, and to eliminate funding for comminution research in Appleton. Finally, they argue that Mr. Spoonamore "quit his managerial position after not getting a raise due to his resistance to the new management [TQM] philosophy," and was later terminated in spring of 1991 for failure to follow orders regarding cost assessment in a start-up project in Mexico. These reasons, the defendants contend, preclude Mr. Weiss, Mr. Flavel, and Mr. Spoonamore from meeting the "but for" test.

***1457** The plaintiffs respond that the defendants inappropriately limit their discussion to the *McDonnell Douglas* analytical framework applicable to individual discrimination claims involving indirect proof, ignoring the direct evidence indicating a "pattern or practice" of discrimination in this matter. According to the plaintiffs, contrary to the *McDonnell Douglas* approach, "[e]vidence supporting a pattern or practice claim shifts both the burdens of production and persuasion to the employer." They further argue that direct evidence of age discrimination against Mr. Weiss, Mr. Flavel, and Mr. Spoonamore renders the "mixed motives" analysis, rather than *McDonnell Douglas* framework, applicable to their individual discrimination claims; under this approach, a grant of summary judgment is normally not appropriate. Finally, the plaintiffs claim that Mr. Weiss, Mr. Flavel, and Mr. Spoonamore nevertheless have established a prima facie case under *McDonnell Douglas* and have raised significant issues of material fact with respect to the true reasons for the terminations. According to the plaintiffs, Mr. Weiss was terminated despite a long history of solid performance due to a companywide policy of age discrimination emanating from SIAB through Mr. Platner and Mr. Guernsey; they claim that SI's explanation for his termination has changed several times since the filing of

this lawsuit. They also claim that SI has been changing its explanation for Mr. Flavel's termination, and that another younger application engineer was hired after Mr. Flavel was fired. Finally, they argue that Mr. Guernsey referred to Mr. Spoonamore as being "too damn old" and suggested that he be replaced with a younger person, and that the reasons given by SI for his termination are pretextual.

2. *Plaintiff Robert Van Dyke:*

The defendants claim that Mr. Van Dyke cannot establish a prima facie case of age discrimination because no employee outside the protected class was treated more favorably than him. They indicate that, when Mr. Van Dyke became the on-site manager of SI's Stansteel operation in Los Angeles, he was responsible for overseeing the entire business group including engineering, parts sales, quality assurance, sales, contract administration and field service; in November of 1988, most of these functions were transferred to the Milwaukee facility, with Mr. Van Dyke reporting to Mr. Faulkner, age fifty-two (52). According to the defendants, Mr. Faulkner became concerned about several customer complaints relating to Mr. Van Dyke and Stansteel, and considered the amount of Stansteel's outstanding holdbacks to be too high. The defendants claim that, "[a]fter the Stansteel operation continued to show disappointing results during 1989," further consolidation occurred; Dr. Joung decided that an on-site manager was no longer needed at Stansteel, and Mr. Van Dyke was terminated in January of 1990. Four employees remained at Stansteel, each over the age of fifty (50). Furthermore, the defendants claim that, even if Mr. Van Dyke can establish a prima facie case, he cannot prove that these reasons are a pretext for discrimination.

The plaintiffs again respond that the defendants are ignoring the fact that, in a pattern or practice discrimination involving direct evidence, the three-part *McDonnell Douglas* framework is inapplicable, and the defendants, rather than the plaintiffs, bear the burden of establishing that Mr. Van Dyke was fired for a legitimate purpose after the plaintiffs establish their prima facie case. The plaintiffs further argue that there is abundant direct evidence that Mr. Van Dyke's performance was exemplary, that SI was engaged in an effort to reduce the average age of its workforce, and that SI's alleged reasons for firing Mr. Van Dyke were, in fact, pretextual. For example, Dr. Joung purportedly acknowledged in his 1990–91 business plan that he had made progress in meeting the company's goal of filling positions "with younger people as much as possible," and wrote notes asking whether Stansteel's employees were "too old." The plaintiffs further claim that SI's explanations for Mr. Van Dyke's termination have changed since filing of this lawsuit. Finally, the plaintiffs indicate that, under *Kralman v. Illinois Dept. of Veterans Affairs,* 23 F.3d 150 (7th Cir.1994), "the Seventh Circuit held that a *prima facie* case of age discrimination can be ***1458** established where an employer has replaced one over–40 worker with another."

3. *Plaintiffs alleging constructive discharge:*

The defendants claim that the undisputed facts reveal that Mr. Smay, Mr. Meagher, Mr. Isferding, Mr. Jones, Mr. Conradt, and Mr. Coxhill were neither the victims of age discrimination nor constructively discharged. They assert that Mr. Smay, a district sales manager at Appleton, retired in May of 1992 after clashing with Mr. Valitchka, being criticized for low sales volume, and having his sales territory reassigned; he purportedly made no statement about being the victim of age discrimination. Mr. Meagher, also a district sales manager at Appleton, retired after being told that Mr. Guernsey viewed his sales performance as poor and after telling Mr. Gregor that he had planned on retiring in March of 1992 on his sixty-fifth (65) birthday. Mr. Isferding, a senior application and project engineer at Appleton, retired in October of 1991 after being verbally abused by Mr. Quinn on at least two occasions and being transferred to the parts department; again, he purportedly made no statement about being the victim of age discrimination. Robert Jones, also a senior project and application engineer, retired in May of 1991 after being verbally abused by Mr. Quinn with some regularity and notifying management that he wished to pursue other interests and to work as a consultant at a later time; after filing a charge of discrimination with the EEOC, he reportedly declined an offer of reinstatement. Mr. Coxhill was the Manager of Engineering at Appleton when Mr. Guernsey was hired; he retired in July of 1992 after being transferred to the position of Chief Engineer of Product Quality and being verbally abused by Mr. Quinn on at least one occasion. He purportedly made no statement about being the victim of age discrimination. Finally, Mr. Conradt, the Manager of Employee and Community Relations at Appleton, retired in March of 1990 after disagreeing with Mr. Guernsey over management style, performance reviews, and the termination of Mr. Weiss; again, he purportedly made no statement about being the victim of age discrimination. Based on these facts, the defendants claim that none of the six plaintiffs can prove constructive discharge by demonstrating that he (1) suffered a materially adverse employment action, (2) incurred a work environment that was so intolerable that a reasonable person would feel compelled to quit, and (3) sought redress while still employed.

The plaintiffs respond that each of these plaintiffs were targets of SI's pattern of age discrimination, which was implemented in this country shortly after SIAB's acquisition of Allis–Chalmers in 1989 through Mr. Guernsey. According to the plaintiffs, Mr. Guernsey and other senior managers were hired based on age-based criteria, and Mr. Guernsey told several of his managers that younger employees were needed and implemented a scheme to rid SI of older employees. The plaintiffs claim that Mr. Meagher and Mr. Smay only retired, despite years of exemplary performance, after hearing of Mr. Guernsey's contempt for older employees (including specific references to Mr. Meagher), having grossly inflated and clearly unattainable sales goals thrust upon them, and being subjected to demeaning performance reviews and trumped-up job descriptions. They also assert that, in conformity with Mr. Guernsey's expressed sentiments regarding older employees, Mr. Quinn targeted Mr. Jones and Mr. Isferding, despite their respective histories of satisfactory performance, through verbal abuse, physical intimidation, public humiliation, and adverse treatment which lasted until each announced his retirement. The plaintiffs further argue that Mr. Guernsey, when removing Mr. Coxhill from the position of Manager of Engineering, made very clear his intention that Mr. Coxhill retire despite his years of solid performance, and only reassigned him to the "concocted" position of chief engineer, with little authority, to "warehouse" him after he voiced his shock and disapproval; in that position, he was placed under the authority of Mr. Quinn, whose abusive style was well-known. Finally, they indicate that Mr. Conradt resigned only after (1) witnessing SI's plan of age discrimination, (2) "repeatedly observing Guernsey implement Svedala's plan of age discrimination, over his objection" in the termination of Mr. Weiss, (3) being threatened ***1459** with termination "if he failed to support plainly age-based actions taken by Guernsey," and (4) having his own job responsibilities downgraded and being subjected to unfair criticism by Mr. Guernsey.

B. ***LEGAL FRAMEWORK:***

1. ***Individual Discrimination Claims:***

[5] [6] Under the Age Discrimination in Employment Act ("ADEA"), it is "unlawful for an employer ... to discharge [ ] or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). In discrimination cases where the disparate treatment of a single employee is at issue, *see, e.g., Kirk v. Federal Property Management Corp.,* 22 F.3d 135, 138 (7th Cir.1994) (race discrimination case under Title VII), "[a] plaintiff may prove age discrimination in one of two different ways"; she may either produce direct or circumstantial evidence that age was the determining factor in her discharge, or, "as is more common, she may utilize the indirect, burden-shifting method of proof for Title VII cases originally set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and later adapted to age discrimination claims under the ADEA." *Anderson v. Baxter HealthCare Corp.,* 13 F.3d 1120, 1122 (7th Cir.1993) (citing *McCoy v. WGN Continental Broadcasting Co.,* 957 F.2d 368, 371 (7th Cir.1992). Direct evidence of discrimination, of course, includes any acknowledgement by the defendant that discriminatory intent was behind its treatment of the plaintiff; circumstantial evidence, in turn, may involve, *inter alia,* proof of suspicious timing, ambiguous statements and behavior, inappropriate remarks, and "comparative evidence of systematically more favorable treatment toward similarly situated employees not sharing the protected characteristic." *Loyd v. Phillips Bros., Inc.,* 25 F.3d 518, 522 (7th Cir.1994) (gender discrimination case under Title VII). *Accord Troupe v. The May Dep't Stores Co.,* 20 F.3d 734, 736 (7th Cir.1994) (gender discrimination case under Title VII).

[7] [8] [9] [10] [11] Under the burden shifting approach of *McDonnell Douglas,*

> "the plaintiff must initially establish a prima facie case of discrimination. In order to establish a prima facie case, the plaintiff must show: (1) she was a member of the protected class (age 40 or over), (2) she was doing the job well enough to meet her employer's legitimate expectations, (3) she was discharged or demoted, and (4) the employer sought a replacement for her. *Sarsha v. Sears, Roebuck & Co.,* 3 F.3d 1035, 1039 (7th Cir.1993).
>
> If the plaintiff succeeds in establishing a prima facie case, this creates a rebuttable presumption of discrimination, and the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employee's discharge. If the employer is successful, the presumption dissolves, and the burden shifts back to the employee to show that the employer's proffered reasons are a pretext for age discrimination. *Weihaupt v. American Medical Ass'n,* 874 F.2d 419, 426–27 (7th Cir.1989)."

Anderson, 13 F.3d at 1122. If the plaintiff successfully shows that the employer has offered "a pretext—a phony reason—for why it fired the employee, then the trier of fact is permitted, although not compelled, to infer that the real reason was age." *Visser v. Packer Eng'g Ass'n, Inc.,* 924 F.2d 655, 657 (7th Cir.1991) (en banc) (citing *Shager v.*

Upjohn Co., 913 F.2d 398, 401 (7th Cir.1990)). *Accord Anderson,* 13 F.3d at 1122–24. However, because " 'the ultimate burden' of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff ... the plaintiff might be well advised to present additional evidence of discrimination, because the factfinder is not *required* to find in her favor simply because she establishes a prima facie case and shows that the employer's proffered reasons are false." *Anderson,* 13 F.3d at 1124 (citing *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, ——, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 (1993)). For summary judgment purposes, a non-moving plaintiff must only "produce evidence from which a rational factfinder could infer that [her employer] lied" about its proffered reasons for ***1460** dismissal. *Anderson,* 13 F.3d at 1124; *Shager,* 913 F.2d at 401.

2. *Pattern or Practice Discrimination Claims:*

[12] [13] [14] An analogous analytical framework applies to an ADEA representative action brought by either the EEOC or an individual plaintiff alleging a pattern or practice of disparate treatment. *See, e.g., Coates v. Johnson & Johnson,* 756 F.2d 524, 531 (7th Cir.1985) (race discrimination case under Title VII). In the Seventh Circuit, "[p]laintiffs who raise a pattern or practice class claim have as their initial burden the task of demonstrating that unlawful discrimination has been the regular policy of the employer, *i.e.,* that 'discrimination was the company's standard operating procedure—the regular rather than the unusual practice.' " *Coates,* 756 F.2d at 532 (*quoting International Bhd. of Teamsters v. United States,* 431 U.S. 324, 336, 97 S.Ct. 1843, 1854–55, 52 L.Ed.2d 396 (1977)). Again, such plaintiffs meet their burden by either producing direct or circumstantial evidence that their employer effectuated a pattern of discriminatory age-based decisionmaking, or utilizing a burden-shifting method of proof similar to that articulated in *McDonnell Douglas.*

[15] [16] Under the burden-shifting approach, pattern or practice discrimination actions are generally bifurcated at trial into two parts; a liability, or *prima facie* phase, where the plaintiffs must prove discriminatory policy by a preponderance of the evidence, and a remedial phase, where the scope of relief awardable to each individual plaintiff is litigated. *Teamsters v. United States,* 431 U.S. 324, 361, 97 S.Ct. 1843, 1867–68, 52 L.Ed.2d 396 (1977); *Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867, 876, 104 S.Ct. 2794, 2799–2800, 81 L.Ed.2d 718 (1984); *In re W. Dist. Xerox Litigation,* 850 F.Supp. 1079, 1081–82 (W.D.N.Y.1994); *Forehand v. Florida State Hosp. at Chattahoochee,* 839 F.Supp. 807, 813 (N.D.Fla.1993). Under this procedure, efficiency is best enhanced if the same jury makes liability and remedial factual findings, as (1) the plaintiffs need not reintroduce in the remedial phase anecdotal evidence already presented during the liability phase, (2) the defendants need not re-introduce in the remedial phase defenses already presented in the liability phase, and (3) conflicting discrimination findings as to plaintiffs whose cases are litigated in the liability phase are avoided.

a. *Liability phase:*

1) *Plaintiffs' proof:*

[17] [18] In the liability, or *prima facie* phase, of trial, the plaintiffs "have as their initial burden the task of demonstrating that unlawful discrimination has been the regular policy of the employer, *i.e.,* that 'discrimination was the company's standard operating procedure—the regular rather than the unusual practice.' " *Coates,* 756 F.2d at 532 (*quoting Teamsters,* 431 U.S. at 336, 97 S.Ct. at 1854–55). *Accord King v. General Elec. Co.,* 960 F.2d 617, 623 (7th Cir.1992); *Forehand,* 839 F.Supp. at 813. A formal written policy is not required to establish such a pattern or practice; an informal or unstructured method of decision-making may be sufficient to invoke this doctrine. *See Reed v. Lockheed Aircraft Corp.,* 613 F.2d 757, 760–61 (9th Cir.1980); *Glass v. IDS Fin. Serv., Inc.,* 778 F.Supp. 1029, 1052 (D.Minn.1991). At this stage, the plaintiffs need not "offer evidence that each person for whom [they] will ultimately seek relief was a victim of the employer's discriminatory policy. [Their] burden is to establish a *prima facie* case that such a policy existed." *Teamsters,* 431 U.S. at 360, 97 S.Ct. at 1867. *Accord Xerox,* 850 F.Supp. at 1081.

[19] [20] [21] [22] [23] In establishing their *prima facie* case, the plaintiffs should produce "statistical evidence demonstrating substantial disparities in the application of employment actions as to [the protected] and the unprotected group, buttressed by [anecdotal] evidence of general policies or specific instances of discrimination." *Coates,* 756 F.2d at 532.2 ***1461** Where the plaintiff class is prohibitively large for each plaintiff to provide individual testimony of alleged discriminatory conduct, plaintiffs regularly present anecdotal testimony from a subset of plaintiffs in seeking to establish their *prima facie* case. *See, e.g., Teamsters,* 431 U.S. at 338, 357, 97 S.Ct. at 1855–56, 1865–66 (*prima facie* case met where plaintiff class of over three-hundred employees provided specific evidence of company-wide discrimination against only forty plaintiffs); *King,* 960 F.2d at 619 (*prima facie* case not met where plaintiff class of fifteen employees provided

testimony of six such employees in support of pattern or practice claim); *Chisholm v. United States Postal Serv.*, 665 F.2d 482, 495 (4th Cir.1981) (*prima facie* case met where plaintiffs provided testimony of subset of twenty plaintiffs in support of discrimination claim). Anecdotal evidence must suggest broad-based discrimination, however, as providing mere "isolated or sporadic discriminatory acts by the employer is insufficient to establish a prima facie case of a pattern or practice of discrimination." *King,* 960 F.2d at 622. *See also Teamsters,* 431 U.S. at 336, 97 S.Ct. at 1854–55; *Forehand,* 839 F.Supp. at 813.

2) *Defendants' rebuttal:*

[24] [25] [26] During the liability, or *prima facie,* stage of proceedings, the defendants may, of course, counter the plaintiffs' proof through cross-examination and the presentation of rebuttal evidence, both statistical and anecdotal, in an "attempt to show that the plaintiff's 'proof is either inaccurate or insignificant.' " *Craik v. Minnesota State Univ. Bd.,* 731 F.2d 465, 470 (8th Cir.1984) (*quoting Teamsters,* 431 U.S. at 360, 97 S.Ct. at 1867). *See also Coates,* 756 F.2d at 532.3 The strength of rebuttal evidence that the defendants must produce "to prevent the plaintiff[s] from carrying the burden of persuasion as to disparity [in treatment among employee groups] depends, as in any case, on the strength of the plaintiffs' proof." *Coates,* 756 F.2d at 532 (*quoting Segar v. Smith,* 738 F.2d 1249, 1268 (D.C.Cir.1984)).

[27] [28] [29] [30] As previously indicated, because plaintiffs at this stage generally elicit anecdotal evidence from only a subset of the plaintiff class, defendants in most cases do not provide rebuttal evidence against every named plaintiff; instead, their proof is limited to evidence and testimony which counters the plaintiffs' *prima facie* presentation. As noted in *Teamsters,*

> "[t]he employer's defense must, of course, be designed to meet the prima facie case of the [plaintiffs]. We do not mean to suggest that there are any particular limits of the type of evidence an employer may use. *The point is that at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking.*"

(Emphasis added). During this stage, then, the defendants' rebuttal evidence is tailored to the plaintiffs' *prima facie* case. *Segar,* 738 F.2d at 1267. While defendants may attempt to establish a nondiscriminatory reason for an adverse employment decision against a testifying plaintiff, *see Coates,* 756 F.2d at 532, they need not do so depending on their assessment of the strength of the plaintiffs' evidence; again, the focus is on the presence or absence of a company-wide discriminatory policy, and not on individual employment decisions.4 It is only during the second, or remedial, phase of trial that the defendants must establish that individual ***1462** plaintiffs were not, in fact, victims of the discriminatory practice to escape liability. *Teamsters,* 431 U.S. at 362, 97 S.Ct. at 1868; *Craik,* 731 F.2d at 470; *Xerox,* 850 F.Supp. at 1081–82; *Forehand,* 839 F.Supp. at 813.

3) *Jury determination:*

[31] [32] [33] [34] Throughout this stage of proceedings, the plaintiffs bear the burden of persuasion as to establishing a *prima facie* case of pattern or practice age discrimination. *Teamsters,* 431 U.S. at 360, 97 S.Ct. at 1867; *King,* 960 F.2d at 623; *Coates,* 756 F.2d at 532; *Xerox,* 850 F.Supp. at 1081–82; *Forehand,* 839 F.Supp. at 813. At the close of the liability phase of trial, the jury is asked through appropriate instructions whether or not the plaintiffs have met their burden of establishing by a preponderance of the evidence that the defendants engaged in a pattern or practice of age discrimination during the relevant time frame. If the jury responds negatively, then trial of the plaintiffs' pattern or practice claim is completed and the plaintiffs are left to pursue individual discrimination claims, presumably before a different factfinder.5 If, on the other hand, the jury responds affirmatively, the Court may award prospective relief to the plaintiffs as sought by the EEOC. *Teamsters,* 431 U.S. at 361, 97 S.Ct. at 1867–68; *Craik,* 731 F.2d at 470. As to the scope of individual relief to which the plaintiffs might be entitled, the Court must move to the second, or remedial, phase of trial. *Teamsters,* 431 U.S. at 361, 97 S.Ct. at 1867–68; *Craik,* 731 F.2d at 470; *Forehand,* 839 F.Supp. at 813.

b. *Remedial phase:*

[35] If the plaintiffs prevail in the liability, or *prima facie* phase, of trial, then the proceedings move into the second, or remedial phase, of trial, where "[t]he proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." *Teamsters,* 431 U.S. at 362, 97 S.Ct. at 1868. Under such circumstances, it is presumed that each

individual plaintiff has been the victim of age discrimination at the hands of the defendant. *Cooper,* 467 U.S. at 875, 104 S.Ct. at 2799; *King,* 960 F.2d at 623; *Xerox,* 850 F.Supp. at 1081.

1) *Defendants' proof:*

[36] [37] This presumption of discrimination shifts to the defendants the burden of demonstrating that the individual plaintiffs were not victims of the discriminatory practice. *Teamsters,* 431 U.S. at 362, 97 S.Ct. at 1868; *King,* 960 F.2d at 623; *Xerox,* 850 F.Supp. at 1081–82. This includes "not only the burden of production, but also the burden of persuading the trier of fact that it is more likely than not that the employer did not unlawfully discriminate against the individual." *Craik,* 731 F.2d at 470. *Accord King,* 960 F.2d at 623; *Forehand,* 839 F.Supp. at 813.6 "The *Teamsters* approach thus differs from the traditional *McDonnell Douglas* analysis in that the burden of persuasion can shift from plaintiffs to defendants." *Xerox,* 850 F.Supp. at 1082.

[38] [39] [40] To rebut the presumption of discrimination as to each plaintiff, the defendants ***1463** must establish by a preponderance of the evidence that age discrimination was not a "determining factor" or a "but-for" element in their employment decisions. *See Sarsha v. Sears, Roebuck & Co.,* 3 F.3d 1035, 1038 (7th Cir.1993); *Fisher v. Transco Services–Milwaukee, Inc.,* 979 F.2d 1239, 1243 (7th Cir.1992). In attempting to meet this burden, the defendants may again present evidence demonstrating that the plaintiffs' "proof is either inaccurate or insignificant," *Teamsters,* 431 U.S. at 361, 97 S.Ct. at 1867–68; *Coates,* 756 F.2d at 532; *Craik,* 731 F.2d at 470, or that a nondiscriminatory explanation exists for the presumed discriminatory termination of each plaintiff. *See Coates,* 756 F.2d at 532. The amount of damages awardable to each plaintiff is also litigated during this phase of trial. *See Teamsters,* 431 U.S. at 361, 97 S.Ct. at 1867–68; *Craik,* 731 F.2d at 470; *Forehand,* 839 F.Supp. at 813.

2) *Plaintiffs' rebuttal:*

[41] [42] [43] [44] During the remedial stage of proceedings, the plaintiffs may, of course, counter the defendants' proof through cross-examination and the presentation of rebuttal evidence in an attempt to show that the defendants' non-discriminatory justifications for their employment decisions are merely a pretext for discrimination. *See, e.g., Sarsha,* 3 F.3d at 1039; *Fisher,* 979 F.2d at 1243. As a general rule, "[p]retext may be established directly with evidence that [the defendant] was more likely than not motivated by a discriminatory reason, or indirectly by evidence that the employer's explanation is not credible." *Sarsha,* 3 F.3d at 1039. As previously indicated, however, unlike in the *McDonnell Douglas* format applied to individual discrimination claims, the *Teamsters* model imposes no burden on the plaintiffs to produce such evidence, and the burden of persuading the factfinder that age discrimination was not a determining factor in each of the defendants' employment decisions remains with the defendant. *See Teamsters,* 431 U.S. at 362, 97 S.Ct. at 1868; *King,* 960 F.2d at 623; *Craik,* 731 F.2d at 470; *Xerox,* 850 F.Supp. at 1081–82. The strength of rebuttal evidence that the plaintiffs must produce to prevent the defendants from carrying their burden of persuasion again will depend, as in any case, on the strength of the defendants' proof. *See Coates,* 756 F.2d at 532 (*quoting Segar v. Smith,* 738 F.2d 1249, 1268 (D.C.Cir.1984)). In addition, the plaintiffs are required to litigate the amount of damages awardable to each named party during this stage of proceedings. *See Teamsters,* 431 U.S. at 361, 97 S.Ct. at 1867–68; *Craik,* 731 F.2d at 470; *Forehand,* 839 F.Supp. at 813.

3) *Jury determination:*

[45] At the end of the remedial phase of trial, the jury is asked through appropriate instructions whether the defendants "willfully" violated the Age Discrimination in Employment Act, and whether the defendants have proven by a preponderance of the evidence that each individual plaintiff was not a victim of age discrimination; they are also asked to assess damages for each named plaintiff.

C. *ANALYSIS:*

[46] Where individual and class-claims are bought contemporaneously, courts should "consider the evidence relating to the individual claims in [their] assessment of the class claim, and vice-versa, since evidence relevant to one is also relevant to the other." *Coates,* 756 F.2d at 533. The class claim, however, "is to be considered first, since if the class claim has merit, the named and unnamed individual class members are entitled to the burden-shifting presumption of *Teamsters.*" *Id.*

1. *Pattern or Practice Discrimination:*

Because the Court finds that a reasonable jury could conclude that the defendants engaged in a pattern or practice of age discrimination, and that this practice was

the determining factor, or "but for" cause, for the termination or "retirement" of each plaintiff named in this motion, the defendants' Motion for Summary Judgment must be denied.

a. *Plaintiffs' prima facie case:*

[47] Viewing (as we must) the factual submissions of the parties in a light most favorable to the non-movants, it is clear that ***1464** the plaintiffs present adequate evidence to establish a *prima facie* case of pattern or practice discrimination by SI against older employees which emanated from its Sweden parent, SIAB. The jury may adopt as true the following factual summary. SIAB and SI had interlocking management structures and had direct, frequent, and substantial contact with one another through business and financial planning arrangements. When Mr. Guernsey was interviewed in Sweden by Mr. Older and Mr. Knuttson for the general manager position at Appleton, they discussed specific personnel in Appleton, including Mr. Weiss. While interviewing for the same position in Sweden, Mr. Gregor was told that SI was "looking for a guy in his late 30's." Dr. Joung and Mr. Soriano, after returning from a conference for senior managers in Sweden, reported that Swedish management was concerned about the high average age of the workforce at the Milwaukee facility, and wanted action taken to bring in younger workers. Mr. Soriano also stated that, while SIAB management believed that Milwaukee had a problem with older workers, it found the "age problem" at Appleton to be even worse. Written business plans submitted to SIAB by Dr. Joung noted the "high average age" of SI's employees as a "principal weakness" of the Milwaukee unit, and indicated that a program had been initiated to fill position with younger people, thereby decreasing the average age of employees.

Mr. Conradt, the Manager of Human Resources at the Appleton unit, and Mr. Merten shared a mutual concern over the perceived "youth cult" being imposed on SI by SIAB management, and Mr. Merten told Mr. Conradt that SI had a policy which favored younger workers over older employees. Mr. Merten also told Mr. Conradt "off the record" that an applicant for the Appleton General Manager job had been rejected because he was "too old." SI retained a professional executive search firm in its general manager search; Mr. Platner and Mr. Knuttson informed the firm that (1) the Appleton business unit had been populated by "people who had been in the business 30 years or more, and the message was we need to get new and different thinking and leadership that in looking toward the future that isn't just a prologue to the past," and (2) in conducting the general manager search, SIAB wanted to avoid "calcified" candidates. The youngest of the ten finalists selected by the search firm, Mr. Guernsey, age thirty-seven (37), was given the position. Mr. Guernsey maintained regular communication with SIAB management regarding business objectives, planning, personnel issues, and related matters.

Mr. Conradt observed employment policies and practices at SI in 1989 which he found to be discriminatory against older workers. Mr. Conradt was asked by Mr. Merten to calculate the average age of salaried employees at the Appleton facility; he was concerned that this request was part of an overall program to get rid of older workers. As he had done in prior years, he also compiled a list of employees ages sixty (60) and older; after receiving the list, Mr. Guernsey commented that "we've got an awful lot of long service employees. We need to get some young—ah, new blood into the organization." In January of 1990, Mr. Guernsey told Mr. Weiss that "the problem with Appleton is that we have too many old people in their jobs too long." When Mr. Conradt later objected to the termination of Mr. Weiss, Mr. Guernsey responded that he had "two choices, [ ] do as I tell you or there is the door." In February of 1990, Mr. Guernsey conducted his first performance review of Mr. Gregor, establishing written performance objectives including the development of a "young generation of salesmen and manager candidates." Mr. Guernsey told Mr. Gregor that he had calculated the average age of the Appleton sales force to be 55–56 years old, that this number was too high, that they needed to hire a younger and more aggressive sales force, that the current force was "old and stale," and that he was not comfortable working with older employees. On a number of occasions, Mr. Guernsey ordered Mr. Gregor to terminate Mr. Meagher, an "old incompetent" who needed to be replaced with some "young blood." Mr. Guernsey also criticized Mr. Gregor for promoting Mr. Spoonamore, noting that he had a better candidate who was a "very young, professional guy." Mr. Guernsey further instructed ***1465** Mr. Gregor that, if he could not get rid of certain employees, he would have Mr. Stelter find a way to do so.

Only managers in their thirties and forties were selected by SIAB management to attend the Nordic Hills management assessment conference; nominees' job location, name, present title and age were primary factors considered in selection. Mr. Quinn was the only manager from Appleton selected to attend; Mr. Weiss and Mr. Foy were rejected. Mr. Quinn was later promoted to Mr. Coxhill's position of Manager of Engineering. In approximately April of 1991, Mr. Valitchka told Mr. Gregor that SI's program was to reduce the average age of its sales force by bringing in younger employees. In a meeting later that month, Mr. Gregor commented that pictures of equipment on Mr. Quinn's wall included some "real antiques"; Mr. Guernsey responded that he thought Mr. Gregor was referring to Mr.

Quinn's sales force. Mr. Quinn's conduct toward subordinates was abusive, especially toward older employees; SI management was aware of his behavior.

There is evidence suggesting that Mr. Valitchka and Mr. Stelter revised the job description for regional sales representatives, adding new physical and endurance demands which were not necessary to the position and were designed to discriminate against older employees with medical conditions, including Mr. Smay, Mr. Meagher, and Mr. Pape. Before he was terminated, Mr. Coxhill was instructed by Mr. Guernsey to present information as to each Appleton engineer's age, date of birth, and years of service. Within two years after Mr. Guernsey arrived at Appleton, at least eleven employees above age fifty were no longer employed at the facility. When Mr. Lenhart was interviewed in Sweden as Mr. Merten's replacement, he was asked for his date of birth, and was told that "in Sweden they have no laws against asking folks for their date of birth." When Mr. Platner selected Mr. Fons as general counsel for SI, he used Mr. Fons' college graduation date to compute his name, which did not appear on his resume. At the Milwaukee unit, applications for employment from older individuals were routinely rejected with handwritten notes emphasizing the applicants' ages.

On February 13, 1991, the Milwaukee facility carried out a reduction-in-force (RIF) which resulted in the termination of twenty (20) employees. Eighteen of these workers were over age forty; one of the two below-forty people released, as well as the youngest of the remaining eighteen employees, were subsequently rehired by SI. Notes from the management meeting preceding the RIF indicate that the age of employees considered for termination was discussed. Most of the employees terminated were fifty years of age or older.

If inadequately rebutted by the defendants, and found to be true by the jury, these facts, coupled with the particular termination decisions made as to each plaintiff, adequately (though not overwhelmingly) establish the adoption of a pattern or practice of age discrimination at SI at the behest of its corporate parent, SIAB. Because a reasonable factfinder could conclude that the plaintiffs have met their *prima facie* case, we presume for the purposes of this motion that the individual plaintiffs are entitled to the burden-shifting presumption of *Teamsters* previously discussed.

b. *Defendants' rebuttal:*

A reasonable jury could further conclude that the defendants have not met their burden of establishing that, despite the presumption of age discrimination, age discrimination was not a "but for" cause, or determining factor, in the termination of any of the named plaintiffs.

1) *Plaintiffs Ronald Weiss, Malcolm Flavel and Richard Spoonamore:*

[48] Viewing the evidence in a light most favorable to the plaintiffs, a reasonable jury could conclude that SI's explanations for the termination of Mr. Weiss, Mr. Flavel and Mr. Spoonamore are merely a pretext for age discrimination. As to Mr. Weiss, Appleton's Manager of Manufacturing, the defendants suggest that he was terminated because he did not have in place adequate programs to improve plant safety and reduce quality control, ***1466** purchasing, and inventory costs, and resisted Mr. Guernsey's TQM management philosophy. The plaintiffs, however, present evidence that Mr. Weiss had a history of satisfactory performance and had instituted numerous safety measures, including a management safety council, a safety brigade, safety tours, weekly safety programs, safety posters, periodic safety contests and awards, and a full-time nurse. They also indicate that Mr. Platner had eliminated the total quality assurance department at Appleton as a cost-savings measure, reassigning TQM to the engineering department, that Mr. Weiss preserved as much of the TQM program in manufacturing as he could, and that, in the period preceding Mr. Guernsey's arrival, Mr. Weiss was working on a large cost reduction plan. Given these facts, a reasonable factfinder could conclude that SI has not met its burden of establishing by a preponderance of the evidence that Mr. Weiss was not terminated due to his age.

The defendants present evidence that, while his performance was satisfactory, Mr. Flavel was terminated because his international marketing responsibilities were transferred to Minco and funding for his comminution research was eliminated. The plaintiffs, however, indicate that, despite his qualifications, Mr. Flavel was passed over for several open positions at Appleton and Minco. They also indicate that, when initially responding to Mr. Flavel's EEOC charge, the defendants claimed that Mr. Flavel was terminated because comminution research had been transferred to Sweden, and made no mention of decreases in funding or the transfer to Sweden of international marketing functions. Again, the jury could reasonably conclude that SI's proffered explanations are simply a pretext for age discrimination, and that the defendants have not met their burden.

According to the defendants, Mr. Spoonamore was terminated because he resisted the implementation of TQM

principles espoused by Mr. Guernsey and had disobeyed Mr. Guernsey's directives on the costs relating to the above-referenced project in Mexico. The plaintiffs, however, indicate that Mr. Spoonamore's performance was "seriously undermined" by Mr. Guernsey, Mr. Quinn, and Mr. Dircks, who, *inter alia,* routinely contacted his subordinates without his notification and verbally abused him, including making ageist comments, in front of others. They also assert that Mr. Spoonamore did not resist TQM at Appleton, is conversant with TQM principles, believes that they can be effective, and merely expressed doubts about the applicability of certain specific management strategies to his small department. They also present evidence that Mr. Guernsey was critical of his performance, and denied him a raise, even though he had never conducted a performance review of him or provided written notice of alleged performance deficiencies, and that Mr. Spoonamore followed Mr. Guernsey's instructions on the Mexican project. A reasonable jury may reject the defendants' explanation of Mr. Spoonamore's termination/constructive discharge as pretextual; as a result, their summary judgment motion must be denied as to this plaintiff.

2) *Plaintiff Robert Van Dyke:*

[49] Viewing the evidence in a light most favorable to the plaintiffs, a reasonable jury could conclude that SI's explanation for the termination of Mr. Van Dyke was merely a pretext for age discrimination. According to the defendants, Mr. Van Dyke was dismissed after his responsibility for resolving holdbacks on certain equipment contracts was transferred to Milwaukee in response to customer complaints and after further consolidation of the Stansteel operation with the Milwaukee facility obviated the need for an on-site manager at Stansteel. They also indicate that Mr. Faulkner harbored serious concerns about Mr. Van Dyke's performance, and that sales volume at Stansteel had steadily declined. The plaintiffs, on the other hand, claim that Mr. Van Dyke was not notified as to concerns over his performance, that he received a 7.1% merit pay increase in August of 1989, and that he never received any performance appraisals after 1984. They also indicate that the termination letter handed to Mr. Van Dyke by Mr. Faulkner did not mention performance problems as a cause for termination, and that SI retained a younger employee at the Stansteel operation who had a history of performance deficiencies. The plaintiffs also contend that Stansteel ***1467** had a reasonable backlog of business when Mr. Van Dyke was terminated, and good prospects for future business.

In our view, a jury assessing this evidence is likely to conclude that the defendants have met their burden of establishing that Mr. Van Dyke was terminated for just cause, namely, a decrease in sales volume and consolidation of managerial functions to the Milwaukee facility. Nevertheless, we are unable to find that a reasonable jury could not make a contrary determination. Mr. Van Dyke may, for example, convince the jury that business prospects at Stansteel were, in fact, good, or that the decision to terminate him rather than the previously-referenced younger Stansteel employee was based, at least in part, on age. Accepting either proposition, the jury may conclude that the defendants' proffered justifications are merely a pretext for age discrimination. Again, the defendants' summary judgment request must be denied.

3) *Plaintiffs alleging constructive discharge:*

[50] [51] [52] Viewing the evidence in a light most favorable to the plaintiffs, a reasonable jury could conclude that SI's explanations for the "retirements" of Mr. Meagher, Mr. Smay, Mr. Jones, Mr. Isferding, Mr. Coxhill, and Mr. Conradt are merely a pretext for age discrimination. In the Seventh Circuit, "[d]emonstrating constructive discharge requires a showing that 'a reasonable employee would have felt compelled to resign under the circumstances of the case.' " *Darnell v. Target Stores,* 16 F.3d 174, 177 (7th Cir.1994) (*quoting Rodgers v. Western–Southern Life Ins. Co.,* 12 F.3d 668, 677 (7th Cir.1993)). A constructive discharge involves more than a mere inconvenience or an alteration of job responsibilities; it is instead established by indicating "a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Crady v. Liberty Nat. Bank and Trust Co.,* 993 F.2d 132, 136 (7th Cir.1993).

According to the defendants, Mr. Smay voluntarily retired because he was unhappy with his performance review and the reconfiguration of his sales territory, and wished to "look after some personal investments." The plaintiffs, on the other hand, indicate that Mr. Smay was constructively discharged only after (1) Mr. Gregor was pressured into reducing the average age of his workforce and was replaced by Mr. Valitchka, (2) SI imposed an inflated sales quota on him during a recessionary year, and unduly criticized his performance, and (3) mindful of Mr. Smay's medical condition, Mr. Stelter created a "new" job description for district sales managers which included "trumped up" physical requirements. Given these facts, a reasonable factfinder could conclude that SI has not met its

burden of establishing by a preponderance of the evidence that Mr. Smay was not constructively discharged due to his age.

The jury may reach a similar conclusion regarding Mr. Meagher. The defendants assert that Mr. Meagher voluntarily retired at age sixty-five (65), as he had planned, after his sales performance had been criticized as subpar, and that he encouraged a colleague to apply for his position. The plaintiffs respond that, like Mr. Smay, Mr. Meagher was constructively discharged only after (1) Mr. Gregor was pressured into reducing the average age of his workforce and was replaced by Mr. Valitchka, (2) SI imposed an inflated sales quota on him during a recessionary year, and unduly criticized his performance, (3) mindful of his medical condition, Mr. Stelter created a "new" job description for district sales managers which included "trumped up" physical requirements, and (4) Mr. Guernsey told Mr. Gregor that Mr. Meagher was an "old incompetent," and instructed him to fire that "old son-of-a-bitch in Florida" and replace him with "young blood." Again, a reasonable jury could conclude that Mr. Meagher was forced to retire as a result of discriminatory conduct on behalf of the defendants; therefore, the defendants' summary judgment request must be denied as to Mr. Meagher.

According to the defendants, Mr. Isferding voluntarily retired because he was unhappy with his transfer to the parts department in a company reorganization at Appleton, despite the fact that he received the same pay as in *1468 his previous position. The plaintiffs respond that Mr. Isferding had always received positive employment reviews, and that he was constructively discharged after being subjected to verbal harassment and adverse treatment by Mr. Quinn based solely on his age and being demoted to the parts department. They also indicate that Mr. Isferding believed that he would soon be fired given company-wide harassment of himself and other older employees. A reasonable factfinder could agree with the plaintiffs that Mr. Isferding was targeted for harassment based on his age, and that the age hostility in his work environment became so unbearable that he felt he had no choice but to retire. For this reason, the defendants' motion must be denied.

The defendants present evidence that Mr. Jones, on his own admission, voluntarily retired because he wished to move to Colorado to be closer to his daughters and to pursue recreational and consulting interests. According to the plaintiffs, Mr. Jones was constructively discharged, despite a long history of satisfactory performance, after being subjected to verbal harassment and adverse treatment by Mr. Quinn based solely on his age. Neither party paints a particularly compelling picture; nevertheless, a jury could reasonably conclude that age hostility in his work environment effectively forced Mr. Jones out of his position. Again, the defendants' request for summary judgment must be denied.

The defendants indicate that Mr. Coxhill voluntarily retired because he was unhappy with his transfer to the new position of Chief Engineer of Product Quality, and then to Field Service Manager, in a company reorganization at Appleton, despite the fact that he received the same pay as in his previous position. The plaintiffs, on the other hand, present evidence that Mr. Coxhill was constructively discharged on the basis of age, despite a history of solid performance, as (1) Mr. Guernsey decided to replace him as Manager of Engineering with Mr. Quinn before he had ever given Mr. Coxhill a performance review (2) when demoting him to the position of Chief Engineer of Product Quality in April of 1991, Mr. Guernsey "suggested" to him that he consider retirement, and indicated that Mr. Stelter was "standing by" to discuss that option with him (3) he was forced to report to Mr. Quinn, whose abusive behavior toward him and other older employees was well documented, and (4) he feared that he would be fired based on a pattern of age discrimination he observed being imposed on him and other older employees. A reasonable jury may reject the defendants' proffered explanation for Mr. Coxhill's retirement, and conclude that he was forced out of the organization on the basis of his age. The defendants may therefore not meet their burden, and summary judgment is inappropriate.

Finally, as to Mr. Conradt, the defendants indicate that he voluntarily retired after (1) his job responsibilities were reduced and he was reprimanded for several performance deficiencies (2) he and Mr. Guernsey had experienced a conflict in management style, and (3) he had become aware that he would receive an inheritance under his father's will. According to the plaintiffs, however, he was constructively discharged after (1) he had observed a pattern of discriminatory practices against older employees at SI (2) Mr. Guernsey told him that we need to get some young—ah, new blood into the organization (3) he unsuccessfully resisted the age-based termination of Mr. Weiss (4) he concluded that SI management wanted him to participate in "illegal and immoral" employment discrimination policies, and feared personal liability for carrying out such policies, and (5) he feared that he would be fired based on his age. Mr. Conradt testifies that he felt he had not choice but to leave SI, even though he enjoyed his work and wanted to continue his employment. Again, a jury could reasonably conclude that Mr. Conradt was effectively forced out of his position due to age hostility by the defendants, and that the defendants have therefore not met their burden. As a result, the defendants' motion must be denied.

c. *Bifurcation procedure to be used at trial:*

[53] In their letter briefs, the plaintiffs in this matter stress that, unlike the plaintiffs in ***1469** *Teamsters* and in most pattern or practice cases, their representative class is relatively small. *See, e.g., Forehand,* 839 F.Supp. at 813. As a result, they indicate that

> "every living Plaintiff will testify in the first phase of trial as part of Plaintiffs' evidence of Defendants' pattern or practice of discrimination. In other words, the evidence of discrimination against every Plaintiff in this lawsuit will be part of the Plaintiffs' pattern or practice case."

By adopting this added degree of caution in providing anecdotal evidence of discrimination, the plaintiffs, no doubt, are mindful of the above-referenced admonishment in *King* and *Teamsters,* that plaintiffs highlight the " 'manifest' difference between individual claims of discrimination and a class action alleging a general pattern or practice." *King,* 960 F.2d at 622. *See also Cooper,* 467 U.S. at 876, 104 S.Ct. at 2799–2800; *Forehand,* 839 F.Supp. at 813. Given the relatively small size of the plaintiff class, the plaintiffs' need to present more than "isolated or sporadic discriminatory acts" to meet their *prima facie* case, and our general reluctance to limit the degree of evidence deemed necessary by the plaintiffs to meet their evidentiary burden, the Court shall allow the plaintiffs to call each of the named plaintiffs as witnesses in establishing their *prima facie* case.[7]

[54] Because the plaintiffs in this matter intend on having each named plaintiff testify in presenting their *prima facie* case, they suggest that the Court "adjust" the *Teamsters* analytical framework by requiring the defendants to present *all* defense evidence relevant to liability, including non-discriminatory reasons for each plaintiff's termination or constructive discharge, during the liability, or *prima facie,* stage of trial. According to the plaintiffs,

> "because Defendants will need to tailor their defense to the evidence presented by the Plaintiffs at the liability phase, the only new evidence to be presented by Defendants in the remedial stage will be their damages evidence ...
>
> In their letter brief to the Court, Defendants argue that a finding as to whether the Plaintiffs were the victims of a pattern or practice of discrimination can only be made in the remedial phase of the trial. However, it makes no sense to wait until after the second phase of the trial to submit questions to the jury regarding evidence submitted in the first phase of the trial. To proceed in that fashion would not only confuse the jury as to what it was to decide and on what evidence, but would also invite the parties to resubmit their evidence and thereby substantially lengthen the time required for trial. Clearly, because all of the liability evidence will be presented in the first phase, efficiency would be enhanced if the jury were asked to decide the existence of the pattern or practice of discrimination and whether Plaintiffs were a victim of that pattern or practice at the end of Phase I of trial."

This procedure, of course, is commonplace in single-plaintiff Title VII cases where discrimination is alleged by only one employee.

While mindful of the differences between this case and *Teamsters,*[8] and cognizant of the intuitive appeal of the approach advanced by the plaintiffs,[9] the Court shall nevertheless institute the *Teamsters* analytical framework in trying this case. We do so for several reasons. First of all, implementation ***1470** of the plaintiffs' approach may unduly prejudice the defendants by unnecessarily lengthening the number of days spent in trial. A significant component of the *Teamsters* framework is potential cost-savings in defending a pattern or practice charge; the employer assesses the strength of the plaintiffs' *prima facie* proof, produces the volume and strength of rebuttal evidence it deems necessary to defeat that charge (which, as previously indicated, often does *not* include giving non-discriminatory reasons for employment decisions regarding testifying plaintiffs), and gets a jury determination as whether the plaintiffs have met their *prima facie* case. Requiring the defendants to use all of their ammunition during the first phase of trial, including giving nondiscriminatory explanations for adverse employment decisions, eradicates this cost-containment strategy established in *Teamsters,* and may unnecessarily lengthen the first stage of trial if the plaintiffs' *prima facie* proof is ultimately rejected by the jury. Secondly, should the jury find that the plaintiffs failed to prove their *prima facie* case, the plaintiffs may nevertheless be entitled to pursue individual discrimination claims under the *McDonnell Douglas* format in separate jury trials for each business unit; under such circumstances, the defendants would be forced to defend themselves against the same discrimination charges twice in three different lawsuits. Again, adoption of the traditional *Teamsters* format may eliminate otherwise-unnecessary litigation costs in the first stage of proceedings without compromising the plaintiffs' right to bring individual claims, and seems more fair to the defendants. Finally, the defendants raise justifiable concerns regarding undue complication of the special verdict form to be issued to the jury.

The Court, then, shall adopt the traditional *Teamsters* model in conducting proceedings in this case. The defendants will be permitted to rebut the plaintiffs' *prima facie* proof during the liability phase with any evidence they deem necessary to establish the absence of a company-wide policy of age discrimination. They need not, however, "lay all their cards on the table" as to justifications for the termination or constructive discharge of testifying plaintiffs if they believe that such evidence is not necessary to defeat the plaintiffs' *prima facie* case. Should the jury determine that the plaintiffs have not met their burden of establishing a *prima facie* case of discrimination, then the defendants may, in fact, have preserved resources and costs accruing to the litigants and the Court in these proceedings, although they may be required to expend those resources in subsequent individual discrimination actions.

If, on the other hand, the jury finds that the plaintiffs have met their *prima facie* case, then the defendants may introduce appropriate defenses not presented in the liability phase to meet their burden of proving non-discriminatory terminations regarding each plaintiff in the remedial stage of proceedings. This may include justifications for the termination of particular plaintiffs, and may require the defendants to recall certain witnesses to the stand for further testimony. Because the same jury will decide these issues, neither the defendants nor the plaintiffs will be permitted to elicit duplicative testimony or reintroduce evidence already presented during the first stage of proceedings. This will ensure that the trial proceeds in an efficient and orderly fashion.

2. *Individual discrimination claims:*

[55] The Court shall defer ruling on the defendants' Motion for Summary Judgment as to the plaintiffs' individual discrimination claims until after completion of the liability, or *prima facie,* phase of trial. If the jury finds that the defendants engaged in a pattern or practice of age discrimination, then the plaintiffs would be entitled to the burden-shifting presumption of *Teamsters* which, unlike the *McDonnell Douglas* format in individual discrimination cases, obligates the *defendants* to prove by a preponderance of the evidence that age discrimination was not a "but for" cause, or determining factor, in any particular employment decision. *Xerox,* 850 F.Supp. at 1082. Presumably, because the burden of persuasion may shift to the defendants under the *Teamsters* approach, but not under the *McDonnell Douglas* format, a finding of pattern or practice discrimination obviates the need to separately pursue individual discrimination claims. *See Coates,* 756 F.2d at 533. Should the jury, however, determine ***1471** that the defendants did not engage in a pattern or practice of age discrimination, we previously saw that the plaintiffs may pursue individual discrimination claims in subsequent proceedings before two different juries; under these circumstances, the defendants' motion as to individual discrimination claims would require Court resolution under the *McDonnell Douglas* format. Until completion of the liability stage of trial, then, the defendants' Motion for Summary Judgment as to individual discrimination claims brought by the plaintiffs is premature; as a result, the Court will not address it at this time, and will consider it in subsequent proceedings only if required to do so pursuant to the jury's determination in the liability phase of the pattern or practice trial and at the request of either party.

IV. *SUMMARY*

For the foregoing reasons, **IT IS HEREBY ORDERED** that the defendants' Motions for Summary Judgment as to (1) the Age Discrimination Claim of Plaintiff Robert Van Dyke (2) the Age Discrimination Claims of Plaintiffs Ronald Weiss, Malcolm Flavel and Richard Spoonamore, and (3) those Plaintiffs Alleging Constructive Discharge—Byron Smay, William Meagher, Robert Isferding, Robert Jones, Major Coxhill, and James Conradt be **DENIED** in the above-captioned matter.

SO ORDERED.

Parallel Citations

70 Fair Empl.Prac.Cas. (BNA) 1088

Footnotes

1 An April 18, 1990 memorandum to Swedish personnel manager Lars Reverman similarly listed a preferred age range of "late 30's or early 40's" for the replacement for the general manager of Boliden Allis UK, Ltd., a British subsidiary of SIAB. (Pl.Resp. to Def. Proposed Findings of Fact ¶ 61.)

2 This is not to say, however, that "the absence of statistical evidence must invariably prove fatal in every pattern or practice case. Where the overall number of employees is small, anecdotal evidence may suffice." *Xerox,* 850 F.Supp. at 1084. *Accord Pitre v. Western Elec. Co.,* 843 F.2d 1262, 1268 (10th Cir.1988); *Haskell v. Kaman Corp.,* 743 F.2d 113, 119 (2d Cir.1984). In other cases, "a plaintiff's statistical evidence alone might constitute a *prima facie* case." *Coates,* 756 F.2d at 532 n. 6 (citing *Segar v. Smith,* 738 F.2d

1249, 1278) (D.C.Cir.1984)). "Neither statistical nor anecdotal evidence is automatically entitled to reverence to the exclusion of the other," *id.* at 533; however, "[w]hen one type of evidence is missing altogether, the other must be correspondingly stronger for plaintiffs to meet their burden." *Xerox,* 850 F.Supp. at 1085.

3 "An employer might show, for example, that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination, or that during the period it is alleged to have pursued a discriminatory policy it made too few employment decisions to justify the inference that it had engaged in a regular practice of discrimination." *Teamsters,* 431 U.S. at 360, 97 S.Ct. at 1867.

4 The defendants, for example, may simply question the accuracy of a testifying plaintiffs' recollection, or attempt to show the absence of any age-based references toward that employee.

5 The effect of such a determination on the plaintiffs' individual discrimination claims "is to leave the plaintiffs with the burden of proving—without assistance from the pattern and practice evidence—that each actionable [termination] suffered by the plaintiffs was the product of intentional discrimination on the part of the defendants. The plaintiffs, in other words, can neither bolster their individual claims for relief with proof that the defendants engaged in a systemwide practice of racial discrimination, nor can they [ ] shift the burden of proof to the defendants." *Forehand,* 839 F.Supp. at 813.

6 Citing *Coates,* 756 F.2d at 532–33 and *Croker v. Boeing Co.,* 662 F.2d 975, 991 (3d Cir.1981), the defendants argue that the burden of persuasion remains with the plaintiffs throughout both phases of trial. The *Coates* decision, however, is limited to a discussion of the burden of persuasion *during the liability phase of a pattern or practice trial,* and does not directly address the issue of burden shifting during the remedial phase of trial, where a presumption of discrimination exists. *See Coates,* 756 F.2d at 532 (noting that "[n]onetheless, at the liability stage of a pattern or practice suit, the plaintiff always bears the burden of persuasion with respect to discrimination"). *Croker,* on the other hand, is a Third Circuit decision whose efficacy in the Seventh Circuit is questionable after the decision in *King,* 960 F.2d at 623.

7 This matter is currently scheduled for a six-week trial; because the Court may limit both the time used by the plaintiffs to prove their *prima facie* case and the introduction of duplicative evidence, the plaintiffs, of course, may be required to adjust their *prima facie* presentation, including limiting the number of plaintiffs called to present anecdotal evidence, accordingly.

8 The Court recognizes that pattern or practice cases do not always fit comfortably into the standard proof sequences. *See, e.g., Teamsters,* 431 U.S. at 358, 97 S.Ct. at 1866; *Segar,* 738 F.2d at 1267 n. 12; *Craik,* 731 F.2d at 470 n. 7.

9 The plaintiffs correctly note that, should we adopt the *Teamsters* approach and the jury finds at the end of the *prima facie* stage of trial that the defendants engaged in a pattern or practice of age discrimination, then trial efficiency may be lost by allowing the defendants to potentially "reserve" justification arguments for the second phase of trial; however, it is by no means certain that the defendants will withhold such arguments, and the Court nevertheless intends on honoring its promise to the parties that duplicative testimony will be kept at a minimum.

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685 F.2d 1149
United States Court of Appeals, Ninth Circuit.

Ruby J. GIFFORD, Plaintiff-Appellant, v. The ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation; Brotherhood of Railway and Airline Clerks, Defendants-Appellees.

Nos. 80-5074, 80-5169 and 80-5246. | Argued and Submitted Sept. 9, 1981. | Decided Aug. 31, 1982. | As Modified on Denial of Rehearing Oct. 25, 1982. | As Corrected Nov. 9, 1982. | Rehearing En Banc Denied Dec. 20, 1982.

Female employee brought action against her employer and union for sex discrimination. The United States District Court for the Central District of California, Harry Pregerson, J., granted summary judgment for the employer and union, and employee appealed. The Court of Appeals, Fletcher, Circuit Judge, held that: (1) challenge to policy requiring clerks to accept assignments at all locations in their district was time-barred; and (2) issues of material fact existed on questions whether requiring heavy lifting for position of wire chief was bona fide occupational qualification, and whether employer's reasons for firing employee were pretextual, precluding, summary judgment.

Affirmed in part; reversed and remanded in part.

Opinion on remand, 549 F.Supp 1.

Wright, Circuit Judge, concurred specially and filed opinion.

West Headnotes (10)

[1] **Civil Rights**
Persons Protected and Entitled to Sue

Ordinarily, if Equal Employment Opportunity Commission retains control over charge of employment discrimination, private plaintiff will not be charged with its mistakes.

5 Cases that cite this headnote

[2] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

In female employee's discrimination action against employer and union, issues of material fact existed on question whether employee was guilty of laches, precluding summary judgment. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

1 Cases that cite this headnote

[3] **Civil Rights**
Operation; Accrual and Computation

Challenge to policy requiring clerks to accept assignments at any location in their district as disadvantageous to women was time-barred where plaintiff was not employed in position subject to allegedly discriminatory policy at any time within 300 days of date on which she filed charges with Equal Employment Opportunity Commission. Civil Rights Act of 1964, § 701 et seq. 42 U.S.C.A. § 2000e et seq.

7 Cases that cite this headnote

[4] **Civil Rights**
Pleading

Female employee's allegation that making application for promotion to position of wire chief would have been futile because of employer's prior refusal to hire women for that position was sufficient to state claim of employment discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

8 Cases that cite this headnote

[5] **Civil Rights**
Defenses in General

Bona fide occupational qualification defense to employment discrimination complaint is affirmative defense. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2 Cases that cite this headnote

[6] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

In female employee's action against employer alleging that failure to promote her to position of wire chief was result of sex discrimination, issue of material fact existed on question whether lifting requirement for position was bona fide occupational qualification, precluding summary judgment. Civil Rights Act of 1964, § 703(e)(1), 42 U.S.C.A. § 2000e–2(e)(1).

7 Cases that cite this headnote

[7] **Civil Rights**
Practices Prohibited or Required in General; Elements

To establish claim of discrimination against employee in retaliation for employee's participation in any investigation or proceeding under the Civil Rights Act, employee need only show that she was discharged following conduct on her part that constituted protected activity and that employer was aware of conduct. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e–3(a).

20 Cases that cite this headnote

[8] **Federal Civil Procedure**
Matters Affecting Right to Judgment

Summary judgment is generally not proper when intent of party is placed in issue.

[9] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

In female employee's action against employer for sex discrimination, issues of material fact existed on question whether employer's reason for firing employee was pretextual or in retaliation for her participation in investigation, precluding summary judgment. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e–3(a).

5 Cases that cite this headnote

[10] **Civil Rights**
Activities Protected

Female employee's opposition to provision in collective bargaining agreement which she reasonably believed was discriminatory was protected activity under civil rights statute making it illegal for employers to retaliate against employees for opposing illegal practices. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

16 Cases that cite this headnote

Attorneys and Law Firms

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Mitchell M. Kraus, Rockville, Md., argued for defendants-appellees; Richard L. Rosett, Raymond W. Thomas, Los Angeles, Cal., on brief.

Appeal from the United States District Court for the Central District of California.

Before WRIGHT and FLETCHER, Circuit Judges, and EAST,* District Judge.

Opinion

FLETCHER, Circuit Judge.

Plaintiff Gifford appeals from the grant of summary judgment to defendants Santa Fe and the Brotherhood of Railway and Airline Clerks (Union) in her Title VII action, 42 U.S.C. s 2000e et seq. We note jurisdiction under 28 U.S.C. s 1291. We conclude that summary judgment was proper as to one of plaintiff's claims, but improper as to both defendants on the remaining claims. Accordingly, we affirm in part and reverse in part the district court's judgment.

I

Plaintiff was hired by Santa Fe on April 20, 1944. In 1965, she was working as an "extra board printer clerk." On October 1, 1965, Santa Fe and the Union signed a new collective bargaining agreement which required extra board printer clerks to accept assignments at all locations in their district. Prior to the 1965 agreement, extra board printer clerks could elect to accept assignments only at their home point without loss of seniority. For the purposes of summary judgment the parties stipulated that both the Union and the employer recognized that the new rule would probably cause several female printer clerks to quit and that more women than men, in fact, resigned or were discharged as a result of the new policy.

On three occasions in 1966, plaintiff was asked to accept assignments at points other than her home point of Bakersfield. On all three occasions, she refused the assignment and immediately resigned. The parties stipulated that if she had not resigned, she would have been fired. On all three occasions she was rehired almost immediately by Santa Fe. Because of her resignation and rehire, she lost all of her accrued seniority rights and other benefits.

In 1967, plaintiff stopped paying the union dues required by the contract. According to plaintiff, her failure to pay was the result of her continuing dispute with the Union and Santa Fe over the changed work rule and her consequent loss of benefits. During 1967 the Union sent her three notices that her dues were delinquent. On November 20, 1967, the Union requested Santa Fe to terminate plaintiff for nonpayment of dues, pursuant to the Union security clause. On November 29, plaintiff wrote to Santa Fe and to the Union, stating that she was tendering her delinquent dues under protest, and that she intended to file a charge with the EEOC. The Union did not accept the tendered dues. On December 4, she sent a letter to the EEOC.

On December 6, Santa Fe wired plaintiff to inquire whether her November 29 letter constituted a request for a hearing on her termination. She responded by wire the same day, although for some reason the wire did not reach Santa Fe until December 21, after the time for requesting a hearing had expired. Plaintiff was terminated without a hearing on December 22, 1967.

Plaintiff filed a formal charge with the EEOC on January 4, 1968. The EEOC did not issue a right-to-sue letter until August 24, 1977. The EEOC was apparently pursuing conciliation efforts and considering filing suit itself during the nine years' delay. Plaintiff's suit was timely filed after her receipt of the right-to-sue letter.

Defendants moved in the district court for dismissal, asserting untimely filing of the suit and laches. The motion was denied ***1152** by minute order. Defendants then moved for summary judgment on the ground that plaintiff's charge to the EEOC was not timely filed and that plaintiff had failed to state a claim. The trial court granted summary judgment to both defendants on January 24, 1980. On appeal, plaintiff argues that her charge to the EEOC was timely filed, and that there were unresolved issues of material fact so that summary judgment was improper. Defendants argue that the charge was not timely, that plaintiff failed to state a claim and that although they did not appeal the denial of summary judgment on the basis of laches, even if plaintiff timely filed the charge with the EEOC and has stated a claim in the complaint, the judgment below should be affirmed on the alternate basis that plaintiff was guilty of laches as a matter of law.

II

LACHES

The district court, in denying defendants' motion for summary judgment on the ground of laches, must have concluded either that there were disputed issues of material fact or that plaintiff was not guilty of laches as a matter of law. This court could affirm the judgment for defendants on the grounds of laches only if we conclude that there are no remaining issues of fact, and that plaintiff was guilty of laches as a matter of law.

[1] Laches is an equitable doctrine, its application depending on the facts of the particular case. This court has affirmed the dismissal on the ground of laches of both private Title VII suits, Boone v. Mechanical Specialities Co., 609 F.2d 956 (9th Cir. 1979), and suits brought by the EEOC, EEOC v. Alioto Fish Co., 623 F.2d 86 (9th Cir. 1980). In both cases, the district court had found unreasonable and unexplained delays in bringing suit. In Boone, this court emphasized that "(I)n the present case we state the exception and not the general rule. Normally, it

may be reasonable for an aggrieved employee to allow the EEOC to retain jurisdiction over a Title VII action." 609 F.2d at 960 (footnote omitted). Boone involved a plaintiff who, the court found, had deliberately delayed seeking a right-to-sue letter. Ordinarily, if the EEOC retains control over a charge, a private plaintiff will not be charged with its mistakes. See, e.g., Watson v. Gulf & Western Industries, 650 F.2d 990, 992 (9th Cir. 1981).

[2] In the instant case, plaintiff's attorney submitted an extensive affidavit in response to defendants' motion for summary judgment, detailing repeated and continuous efforts of plaintiff and her attorneys to monitor the progress of her charge through the EEOC. Documents were also submitted showing that the EEOC had found reasonable cause to believe that plaintiff had been discriminated against. Plaintiff's attorney also alleged that the EEOC had informed him on several occasions that it intended to file suit on plaintiff's behalf. The district court did not err in denying summary judgment on the ground of laches because it is apparent there are material factual issues to be resolved. Accordingly, we decline to affirm on the alternate basis of laches.

III

THE MERITS

In her complaint, Gifford alleges four distinct violations of Title VII. She alleges: (1) that the provisions of the 1965 bargaining agreement had a discriminatory effect on her continuing until the day she was terminated; (2) that the employer continually refused to promote her to the position of wire chief, a position for which she was at all times eligible until the time of her termination; (3) that her termination for nonpayment of union dues was actually in retaliation for her threat to file a charge with the EEOC, rather than for nonpayment of dues; (4) that her termination resulted from her continued opposition to policies she considered discriminatory. Summary judgment was granted defendants on the first claim on the ground that the charge was not timely filed with the EEOC. As to the remaining three, there was no ***1153** contention that the charge was untimely. Summary judgment was granted to defendants on the merits. We conclude that the charge on the first claim was not timely filed and that summary judgment was proper on the first claim only. Summary judgment on the merits of each of the other three claims was improper.

A. The 1965 Agreement

Plaintiff alleges that the policy on extra board printer clerks contained in the 1965 bargaining agreement was instituted with the knowledge and intent on the part of the Union and the employer that the policy would be disadvantageous to women. The parties stipulated that the policy did cause a larger number of women than men to resign. Plaintiff alleges that this was because more of the women were unwilling and unable to travel long distances on short notice to accept temporary assignments. The women, including plaintiff, either resigned to avoid being fired, or were fired for violating a rule on insubordination. The facts alleged by plaintiff constitute both disparate impact and disparate treatment claims under Title VII. See Heagney v. University of Washington, 642 F.2d 1157, 1163 (9th Cir. 1981).

[3] Before reaching the merits of these claims, however, we must determine whether the challenge to the extra board printer clerk policy was timely filed with the EEOC. At the time plaintiff filed her charge with the EEOC, the statute permitted only 90 days after a discriminatory act in which to file a charge. The statute was amended in 1972, however, to allow 180 days. The new limit is applied to charges pending in 1972. Inda v. United Air Lines, Inc., 565 F.2d 554, 560–61 (9th Cir. 1977). In states such as California that have their own enforcement agencies, a complainant has 300 days in which to file a charge. See Watson v. Gulf & Western, 650 F.2d at 992. Accordingly, plaintiffs charge was timely if filed within 300 days after any discriminatory act. Delaware State College v. Ricks, 449 U.S. 250, 258, 101 S.Ct. 498, 504, 66 L.Ed.2d 431 (1980); United Air Lines, Inc. v. Evans, 431 U.S. 553, 555, 97 S.Ct. 1885, 1887, 52 L.Ed.2d 571 (1971).

Plaintiff characterizes her challenge to the extra board printer clerk policy as one based on a continuing violation of Title VII. She contends that because the policy continued in effect and was never discontinued during her tenure, she could have been disadvantaged by it any time by being forced to resign or accept distant assignments. Plaintiff is correct in arguing that an employment policy may constitute a continuing violation of Title VII and hence support a charge of discrimination filed at any time the policy is in effect by an employee subject to the policy. In Williams v. Owens-Illinois, Inc., 665 F.2d 918, 924 (9th Cir. 1982), we noted by way of illustration that:

> [a] minority employee who is not promoted in 1973, for example, and is subject to a continuing policy against promotion of minorities, may then file a timely charge in 1976, because the policy against promoting him or her continued to violate the employee's rights up to the time the charge was filed.

Thus if plaintiff was employed by Santa Fe in a position subject to the allegedly discriminatory extra board printer clerk policy at any time within 300 days of the date on which she filed charges with the EEOC, her challenge to the policy would be timely.

It appears beyond dispute from the record in this case, however, that plaintiff was last employed by Santa Fe in a position subject to the extra board printer clerk policy in April of 1966, more than 300 days before she filed charges challenging the policy. Although plaintiff was rehired by the Railway in May of 1966 and continued to work for the company until December of 1967, this last reemployment was in a regular position not subject to the extra board provision of the 1965 agreement.

As we noted in Williams v. Owens-Illinois, Inc.,

> [a] refusal to hire or a decision to fire an employee may place the victim out of *1154 reach of any further effect of company policy, so that such a complainant must file a charge within the requisite time period after the refusal to hire or termination, or be time-barred. If in those cases the victims can show no way in which the company policy had an impact on them within the limitations period, the continuing violation doctrine is of no assistance or applicability, because mere "continuing impact from past violations is not actionable. Continuing violations are."

665 F.2d at 924 (quoting Reed v. Lockheed Aircraft Corp., 613 F.2d 757, 760 (9th Cir. 1980)). In the instant case, plaintiff's reemployment with Santa Fe in a regular position placed her "out of reach of any further effect" of the allegedly discriminatory extra board printer clerk policy.1 There was no longer a continuing violation with respect to her. She therefore had 300 days from her last employment on the extra board in which to file charges challenging the assignment away from home provisions of the 1965 agreement. This she failed to do and we are accordingly compelled to hold that her challenge to the extra board printer clerk policy is time-barred.

B. Refusal to Promote

Plaintiff's second claim is that defendant Santa Fe consistently failed to promote her to the position of wire chief, a position for which she was qualified, although she never applied. She contends that her failure to apply was the result of Santa Fe's well-known policy of excluding women from the job. Santa Fe responds that the position of wire chief required the lifting of 25 pounds or more, and that at the time, state protective legislation prevented it from hiring women in jobs requiring lifting. Plaintiff agrees that such legislation existed and had not yet been held invalid. See Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, 1225 (9th Cir. 1971). However, she also contends that lifting was not necessary to the job of wire chief, and that Santa Fe could and should have required other employees to do what little lifting was necessary.

[4] The threshold question is whether it was necessary for plaintiff to allege that she applied for the position of wire chief in order to make out a prima facie case. Plaintiff contends that it was not. She is correct if the employer's promotional policies made application futile, or if the employer normally initiated the promotion. Reed v. Lockheed Aircraft Corp., 613 F.2d 757, 761 (9th Cir. 1980). Plaintiff's allegation that an application would have been futile because of Santa Fe's prior refusal to hire women for the position of wire chief is sufficient to state a claim.

As to Santa Fe's defense of reliance on a state statute, this court held in 1971 that state protective legislation which restricts the employment opportunities of women based on stereotyped characteristics of the sexes is invalid under Title VII. Rosenfeld v. Southern Pacific Co., 444 F.2d at 1224-25. One of the statutes held invalid in that case was the very California statute at issue here. The question of what relief could appropriately be given the plaintiffs was not addressed in Rosenfeld, because no individual plaintiffs remained before the court. In a subsequent case, however, this court held that while reliance on an invalid state statute is not a defense to a Title VII suit, good-faith reliance on the part of the employer may in some cases make it inequitable to award back pay. *1155 Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1006-07 (9th Cir. 1972).2

Plaintiff's argument here is somewhat different than that confronted in Rosenfeld and Schaeffer. In both those cases, the protective legislation unquestionably prevented the employment of women in the jobs at issue (heavy lifting in Rosenfeld, 9 hour days in Schaeffer). Gifford argues that the lifting requirement was not necessary to the job. Even if one were to assume the good-faith reliance of Santa Fe on the statute, it is irrelevant since Santa Fe should not have included heavy lifting as a job requirement for wire chiefs.

What the court should examine, then, is whether heavy lifting capability is a "bona fide occupational qualification" (BFOQ) for the position of wire chief under the BFOQ exception in Title VII. 42 U.S.C. s 2000e-2(e)(1). Since the lifting element effectively made sex a requirement for the job under then-existing state law, the question to be addressed is whether lifting was "reasonably necessary to the normal operation of that particular business." Id. See Diaz v. Pan American World

Airways, 442 F.2d 385, 388 (5th Cir. 1971).

[5] [6] The district court held that Gifford had failed to produce any facts to support her assertion that whatever lifting was necessary to the wire chief's job could have been assigned to other available male employees, and that therefore defendants were entitled to summary judgment. What the court failed to recognize, however, is that the BFOQ defense is an affirmative defense. Defendants were required to produce facts in support of the BFOQ claim, rather than plaintiff being required to disprove it. See Harriss v. Pan American World Airways, Inc., 649 F.2d 670, 676 (9th Cir. 1980). If lifting was not "reasonably necessary" to this particular job, then Santa Fe may not plead good-faith reliance on the statute. The facts underlying the BFOQ defense have not yet been addressed by the district court. We conclude that summary judgment on this claim was improper. The district court should consider the merits of plaintiff's claim. Both damages and injunctive relief may be appropriate if the requirement was not a BFOQ. If it was a BFOQ, injunctive relief may still be appropriate since the statute is invalid.

C. Retaliation for Threat to File Charge

Section 2000e-3(a) of Title 42 makes it unlawful to discriminate against an employee in retaliation for the employee's participation in any investigation or proceeding under Title VII. 42 U.S.C. s 2000e-3(a); Sias v. City Demonstration Agency, 588 F.2d 692, 694-96 (9th Cir. 1978). Plaintiff here contends that she was both wrongfully fired and not rehired by Santa Fe, not because she failed to pay her union dues but because she threatened to file a charge with the EEOC. In support of this claim, she alleges that at least two male employees retained their jobs under similar circumstances. The district court held that plaintiff had failed to raise any issues of material fact on these claims because: (1) plaintiff was not similarly situated to the two male employees who were not terminated; (2) plaintiff did not show that it would have been futile to request Santa Fe to rehire her.

[7] [8] Although the district court made no finding, it is clear that plaintiff's allegations were enough to establish a prima facie case of retaliation. To do so, she need only show that she was discharged following conduct on her part that constituted protected activity and that the employer was aware of the conduct. Kauffman v. Sidereal, 667 F.2d 767 (9th Cir. 1982); Aguirre v. Chula Vista Sanitary Service, 542 F.2d 779, 781 (9th Cir. 1976) (per curiam). It is undisputed ***1156** that Gifford wrote a letter to Santa Fe and the Union prior to her firing, in which she threatened to file a charge with the EEOC.3 Defendants then advanced a legitimate, nondiscriminatory reason for the firing, i.e., Gifford's failure to pay her union dues. The issue here, then, centers on pretext: did Gifford come forward with enough evidence to create an issue of fact as to whether her failure to pay union dues was merely a pretext for her firing. See Aguirre, 542 F.2d at 781. This question involves a determination of the intent of the Union in requesting and the employer in discharging plaintiff. Summary judgment is generally not proper when the intent of a party is placed in issue. Haydon v. Rand Corp., 605 F.2d 453, 455 & n. 2 (9th Cir. 1979) (per curiam).

[9] We conclude that Gifford offered sufficient evidence to raise an issue of fact. The district court erred in deciding as a matter of law that Gifford and the two male employees who were not fired were not similarly situated. Gifford's allegations and her opposition to defendants' motion for summary judgment were supported by the "reasonable cause" determination made by the EEOC.4 The EEOC, after an impartial investigation, found reasonable cause to believe that Gifford had been treated differently than similarly situated male employees. See Plummer v. Western International Hotels Co., 656 F.2d 502, 505 (9th Cir. 1981); Bradshaw v. Zoological Society of San Diego, 569 F.2d 1066, 1069 (9th Cir. 1978). The EEOC's report was sufficient at least to create an issue of fact on this question. It was therefore improper for the trial court to resolve the issue on summary judgment.

We reach the same conclusion on the issue of futility. Gifford argues that it would have been futile to apply for rehire. In support of this argument, Gifford submitted an affidavit in which she stated that a Santa Fe employee had told her that neither she nor anyone with the surname Gifford would ever again work for Santa Fe. Additionally, she submitted a copy of a Santa Fe employment form noting her discharge, and marked "Do Not Rehire." The Santa Fe Superintendent of Communications stated in his deposition that the "Do Not Rehire" notation on the form was unusual, and that he did not understand it. Furthermore, it is stipulated that on the prior occasions when Gifford had resigned and been rehired, Santa Fe had initiated the rehire.

On remand, the district court should permit plaintiff to proceed on her claim that the defendants retaliated against her for threatening a Title VII proceeding.

D. Retaliation for Opposition to Illegal Practice

[10] Title VII also makes it illegal for employers and unions to retaliate against employees for opposing practices made illegal by Title VII. 42 U.S.C. s 2000e-3(a). Plaintiff claims that one of the reasons for her termination

was her opposition to the collective bargaining agreement. The district court held that plaintiff lacked a good-faith belief that the agreement was discriminatory, so that she could not rely on this section. The district court reasoned, based on Gifford's deposition testimony, that Gifford believed that the 1965 bargaining agreement discriminated against old but not new female employees, and that although she had complained about the policy since its inception, she did not label it "sex discrimination" until 1967. The court concluded that her initial failure to label the policy as sex-discrimination indicated that her opposition to it was actually based on other grounds.

We conclude that the district court analyzed the opposition issue incorrectly. This ***1157** circuit has held that an employee who opposes employment practices reasonably believed to be discriminatory is protected by the "opposition clause" whether or not the practice is actually discriminatory. Sias, 588 F.2d at 695. It does not follow that the employee must be aware that the practice is unlawful under Title VII at the time of the opposition in order for opposition to be protected. It requires a certain sophistication for an employee to recognize that an offensive employment practice may represent sex or race discrimination that is against the law. Here, Gifford argued from the outset that the collective bargaining agreement had a harsher impact on some of the women than it had on men. It is not necessary that a practice disadvantage all women in order for it to be unlawful under Title VII. See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). A fortiori, an employee who complains of a practice that has a disproportionate impact on a protected group complains of unlawful discrimination and is protected by the opposition clause.

Here, the EEOC found reasonable cause to believe the practice objected to was discriminatory. We have held that Gifford's allegations and supporting evidence are sufficient to survive summary judgment on this issue. This is enough to make Gifford's opposition to the collective bargaining agreement activity protected under Title VII. See Sias, 588 F.2d at 695; Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1004-07 (5th Cir. 1969). The district court erred in dismissing this charge for failure to state a claim.

IV

We conclude that summary judgment was proper with respect to plaintiff's challenge to the extra board printer clerk policy contained in the 1965 collective bargaining agreement. As to each of plaintiff's other three claims, however, we reverse the grant of summary judgment and remand to the district court for trial.

AFFIRMED in part, REVERSED in part, and REMANDED.

WRIGHT, Circuit Judge, concurring specially:

I agree with the result reached by the majority, but the application of laches to a backpay claim deserves some discussion.

The delays in this case are astounding. They deserve a detailed recital.

Gifford filed charges with the EEOC in January 1968. Sante Fe received a copy of those charges in June 1968. The EEOC completed its field investigation by February 1969. Then ended any effort to attend promptly to the matter. Almost two years passed before the EEOC determined that reasonable cause supported Gifford's charges. Gifford and Sante Fe received notice of the reasonable cause determination in January 1971.

In October 1971, the EEOC notified Gifford that a representative would be in Bakersfield soon to meet with her and Santa Fe. No one came. Almost a year and a half later, in February 1973, Gifford wrote to EEOC inquiring about her case. She received no answer.

Gifford employed counsel in January 1974, and some efforts at conciliation followed. But in February 1974 Santa Fe notified the EEOC that under no circumstances would it reinstate her. Santa Fe last heard from the EEOC in October 1974, when the agency officially notified it that conciliation had ended.

In April 1974, Gifford's attorney requested that a right to sue letter be issued. When he called the EEOC in June 1974, he was told that it was considering filing suit itself and that, if it did so, Gifford could intervene at little additional cost. Gifford and her attorney then awaited the EEOC's decision.

From June 1974 to June 1977 the EEOC continually misassigned and mishandled Gifford's file. It was sent to the wrong places, forgotten on desks, and transferred through numerous personnel changes. An affidavit filed with the district court by Gifford's attorney details his calls and letters to the EEOC urging action. The saga ***1158** was indeed, as one EEOC analyst stated, a "flying dutchman odyssey."

Despite the efforts of Gifford's attorney, the EEOC took three years to decide thaat it would not file suit. Had it ddone so in 1977, it faced a strong possibility of dismissal

for laches. See EEOC v. Alioto Fish Co., 623 F.2d 86 (9th Cir. 1980) (delay of 20 months after conciliation ended before EEOC filed suit and 62-month delay in total from when charges were filed found unreasonable.).

The EEOC finally issued Gifford a notice of right to sue in August 1977, and she brought action soon thereafter. By then, the events underlying the suit were almost ten years old. The clock has not stopped running. After remand here, the case returns for trial. Even with expeditious handling, the trial could not be held before 1983 or later. The prospect of litigation over 15 or 16 year-old facts must give pause, as must the prospect of 15 or 16 years of backpay should Gifford prove her claims.

Viewed abstractly, and without assigning blame, the delay clearly is shocking. But laches is an equitable defense, and cannot be applied in the abstract. Nor can it be decided, as Santa Fe urges, as a matter of law on a record that presents unresolved issues of fact.

Affidavits from both sides chronicle the defendant's prejudice and plaintiff's actions to expedite the case. But these merely reveal factual disputes and, of greater importance, are insufficient to resolve a laches claim.

Dismissal for laches requires inexcusable delay by the plaintiff and resulting prejudice to the defendant. Boone v. Mechanical Specialties Co., 609 F.2d 956 (9th Cir. 1979). Laches applies both to suits brought by the EEOC, EEOC v. Alioto Fish Co. Ltd., 623 F.2d 86 (9th Cir. 1980), and to those brought by private plaintiffs. Boone v. Mechanical Specialties Co., supra.

It may bar the entire complaint or only certain claims, the whole remedy sought or only a portion of it. Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 372–73, 97 S.Ct. 2447, 2457–58, 53 L.Ed.2d 402 (1977) (may bar backpay); Albermarle Paper Co. v. Moody, 422 U.S. 405, 424, 95 S.Ct. 2362, 2374, 45 L.Ed.2d 280 (1975) (may bar backpay); EEOC v. Massey-Ferguson, Inc., 622 F.2d 271, 276 (7th Cir. 1980) (may bar entire complaint, certain claims, or backpay); Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 469 (D.C. Cir. 1976) (may limit or preclude backpay); Lynn v. Western Gillette, Inc., 564 F.2d 1282, 1288 (9th Cir. 1977) (may bar or limit backpay); Franks v. Bowman Transportation Co., 495 F.2d 398 (5th Cir. 1974), rev'd on other grounds, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (may bar entire claim or only portion or just backpay).

A district court must examine each claim alleged and remedy sought to determine if sufficient prejudice and delay support defendant's request for dismissal or limitation.

Issues of delay and prejudice are intertwined closely. Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 807 (8th Cir. 1979). Shorter delays require greater prejudice. Longer delays require less. Id. Similarly, greater prejudice requires more reason for delay, and less prejudice will allow longer delays for less compelling reasons.

A defendant's showing of prejudice will necessarily differ for each claim or remedy it seeks to bar or limit. For example, if a defendant asserts laches to bar a claim of disparate treatment, the court will ordinarily examine the availability of witnesses and records to counter that claim. See, e.g., Boone v. Mechanical Specialties Co., 609 F.2d 956 (9th Cir. 1979).

Proof of the reasonableness of delay will not necessarily differ for the various claims and remedies sought. But, because of delay's relationship to prejudice, if delay in seeking a certain type of claim or remedy causes more prejudice than normal, the proof of excuse required may vary accordingly.

In addition to the usual prejudice from lost records and dimmed memories associated with defending substantive claims, delay ***1159** in asserting backpay claims presents the defendant with a distinct prejudice. After an allegedly discriminatory discharge or failure to hire, an employer soon loses touch with the plaintiff. The plaintiff must mitigate any damage, but the defendant bears the burden of proving a failure to mitigate. Sangster v. United Air Lines, Inc., 633 F.2d 864, 868 (9th Cir. 1980). As time passes, meeting this burden becomes progressively more difficult, if not impossible.

To prove failure to mitigate, the defendant must show the availability of suitable positions and plaintiff's lack of due diligence in seeking them. Sias v. City Demonstration Agency, 588 F.2d 692, 696 (9th Cir. 1978). Once an employer has lost contact with the plaintiff, showing availability of positions and plaintiff's lack of diligence could become nearly impossible.

Nor is this prejudice to the defendant's burden of proof balanced by a similar prejudice to the plaintiff's proof, as occurs with the plaintiff's substantive claims. A long delay may prejudice a plaintiff in proving her claims as much as a defendant in countering them. See Harris v. Ford Motor Co., 487 Supp. 429 (W.D. Mo. 1980).

But once the substantive claim is made, little additional proof is needed for a backpay claim. He or she need only introduce pay scales to show what he or she should have earned. To defend, however, an employer must show other jobs were available and that the plaintiff could havelocated them. The defendant is unlikely to have any of this

information in its files.

The Seventh Circuit may have assumed prejudice to the defendant when it reduced a Title VII plaintiff's backpay award by the four years from the time she could have requested a right to sue letter and the time of filing suit. Kamberos v. GTE Automatic Electric, Inc., 603 F.2d 598, 603 (7th Cir. 1979), cert. denied, 454 U.S. 1060, 102 S.Ct. 612, 70 L.Ed.2d 599 (1981). Because the plaintiff knew she could request a right to sue letter 180 days after she filed charges, the court concluded that she could not increase her award by taking advantage of the EEOC's slowness in processing claims. Id. The court did not discuss prejudice.

Kamberos at least suggests that the analysis of laches in asserting backpay claims differs from that in asserting substantive claims. See also Powell v. Zuckert, 366 F.2d 634, 639 (D.C. Cir. 1966). The potential for prejudice to the defendant is great and the plaintiff bears little additional prejudice over and above the burden of proving the underlying claim. Should this defendant reassert laches on remand, as it is free to do, the court should have the distinction in mind.

In addition, it should consider whether a plaintiff's delay after conciliation, pending EEOC decision to sue, is reasonable. Gifford argues that she waited for the EEOC because if it filed suit, she could intervene at little or no extra cost. Her affidavit states that she had limited funds for a law suit. Inability to pay legal fees normally does not excuse a delay in filing suit. Powell v. Zuckert, 366 F.2d 634, 636 (D.C. Cir. 1966). Because Title VII provides for attorney's fees, the excuse is even less persuasive.

I concur in the remand because the record is inadequate to support finding laches as a matter of law. But I stress that the issue remains open. Should Gifford prove her substantive claims of discrimination, the district court may feel compelled to award backpay for 15 or 16 years. I cannot believe Congress intended such a result.

Parallel Citations

29 Fair Empl.Prac.Cas. (BNA) 1345, 34 Fair Empl.Prac.Cas. (BNA) 240, 30 Empl. Prac. Dec. P 33,118

Footnotes

* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

1 Gifford claims that even though in May of 1966 she was rehired by Santa Fe in a regular position, she was still subject to the allegedly discriminatory printer clerk policy because, at any time, a more senior regular employee of Santa Fe could "bump" her from regular employment so that she would return to an extra board position. This potential application of the extra board policy to plaintiff is too speculative. It is akin to a terminated employee arguing that because he or she might be rehired, a charge filed more than 300 days after termination is nonetheless timely. See Williams, 613 F.2d at 760. Were plaintiff able to show that her regular position with Santa Fe was limited in duration or that, for some other reason, she would necessarily be returned to an extra board position, we would face a substantially different question.

2 The district court treated Plaintiff's claim as one solely for damages, and therefore found Schaeffer controlling on the question of relief. Plaintiff in her complaint, however, also sought reinstatement and injunctive relief. Schaeffer is not relevant to the merits of her claim of discrimination, nor to those forms of relief.

3 We see no legal distinction to be made between the filing of a charge which is clearly protected, Sias v. City Demonstration Agency, 588 F.2d 692, 694-95 (9th Cir. 1978), and threatening to file a charge.

4 This court held in Plummer v. Western Int'l Hotels Co., 656 F.2d 502, 505 (9th Cir. 1981) that a Title VII plaintiff has an absolute right to introduce the EEOC's reasonable cause determination into evidence.

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150 F.3d 1217
United States Court of Appeals, Ninth Circuit.

Marsha GODWIN, Plaintiff-Appellant,
v.
HUNT WESSON, INC., a Delaware corporation, Defendant-Appellee.

Nos. 96-56830. \| Argued and Submitted April 8, 1998. \| Decided Aug. 11, 1998. \| As Amended Aug. 31, 1998.

Female employee who was denied promotion brought sex discrimination action against employer pursuant to California Fair Employment and Housing Act (FEHA) The United States District Court for the Central District of California, Alicemarie H. Stotler, J., granted employer's summary judgment motion, and employee appealed. The Court of Appeals, Schroeder, Circuit Judge, held that: (1) employee's direct evidence of sex discrimination raised genuine issues of fact as to whether employer's nondiscriminatory reasons for not promoting employee were pretext, and (2) employee provided substantial circumstantial evidence that employer's proffered reasons for not promoting employee were pretext for sex discrimination, and thus, employer was not entitled to summary judgment.

Reversed and remanded.

West Headnotes (9)

[1] **Civil Rights**
Employment Practices

California law under the Fair Employment and Housing Act (FEHA) mirrors federal law under Title VII, and thus, federal cases are instructive. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; West's Ann.Cal.Gov.Code §§ 12900-12955.

18 Cases that cite this headnote

[2] **Civil Rights**
Particular cases

Female employee established a prima facie case of sex discrimination under California Fair Employment and Housing Act (FEHA), where employee belonged to protected class, employee was performing according to employer's legitimate expectations, employee suffered adverse employment action, and other employees with qualifications similar to her own were treated more favorably. West's Ann.Cal.Gov.Code §§ 12900-12955.

125 Cases that cite this headnote

[3] **Civil Rights**
Motive or intent; pretext

Employee may establish pretext in a sex discrimination action either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
146 Cases that cite this headnote

[4] **Civil Rights**
Employment practices

When an employee, alleging gender discrimination, offers direct evidence of discriminatory motive, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial. West's Ann.Cal.Gov.Code §§ 12900-12955.

128 Cases that cite this headnote

[5] **Civil Rights**
Evidence

"Direct evidence" is evidence that, if believed, proves the fact of discriminatory animus without

inference or presumption.

129 Cases that cite this headnote

[6] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Female employee's direct evidence of sex discrimination in violation of California Fair Employment and Housing Act (FEHA) raised genuine issues of fact as to whether employer's nondiscriminatory reasons for not promoting employee were pretext, where employee offered manager's statement that director did not want to deal with another female after dealing with current female manager and evidence that former female manager was not invited on employer sponsored hunting and fishing trips and was given doll kit containing dildos and oil. West's Ann.Cal.Gov.Code §§ 12900-12955.

73 Cases that cite this headnote

[7] **Evidence**
Statements by agents and employees in general

Manager's statement that director did not want to deal with another female after dealing with current female manager was properly admitted as admission by agent in sex discrimination action under California Fair Employment and Housing Act (FEHA), where comment was not stray remark uttered in ambivalent manner but was instead related directly to positions employee sought. West's Ann.Cal.Gov.Code §§ 12900-12955.

12 Cases that cite this headnote

[8] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Female employee provided substantial circumstantial evidence that employer's proffered reasons for not promoting employee, that males promoted had better experience and more easy going personalities, were pretext for sex discrimination in violation of California Fair Employment and Housing Act (FEHA), and thus, employer was not entitled to summary judgment, where all evidence supporting employer's reasons came from statements prepared after employment decision was made and while litigation was in progress and such statement were inconsistent with statements made at time of employment decision. West's Ann.Cal.Gov.Code §§ 12900-12955.

108 Cases that cite this headnote

[9] **Civil Rights**
Employment practices

Circumstantial evidence that an employer's proffered motives for adverse employment action were not the actual motives because they were inconsistent or otherwise not believable must be specific and substantial in order to create a triable issue with respect to whether the employer intended to discriminate on the basis of sex in violation of the California Fair Employment and Housing Act (FEHA). West's Ann.Cal.Gov.Code §§ 12900-12955.

156 Cases that cite this headnote

Attorneys and Law Firms

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Sharyl P. Bilas, Gibson, Dunn & Crutcher, Irvine, California, for the defendant-appellee.

Appeal from the United States District Court for the Central District of California; Alicemarie H. Stotler, District Judge, Presiding. D.C. No. CV-95-00178-AHS.

***1219** Before: SCHROEDER, FLETCHER,* and Harry PREGERSON, Circuit Judges.

Opinion

SCHROEDER, Circuit Judge:

The issue in this case is a familiar one: what showing of pretext by a plaintiff in a sex discrimination suit is sufficient to overcome a defendant's motion for summary judgment, where the defendant asserts that its refusal to promote the plaintiff was based on legitimate, nondiscriminatory reasons? This is an issue that has troubled the courts in their endeavors to follow the Supreme Court's decisions in this field. *See St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *see also Anderson v. Baxter Healthcare Corp.,* 13 F.3d 1120, 1122 (7th Cir.1994) ("The federal courts ... have not been entirely clear on what constitutes a showing of pretext.").

The district court granted the employer's summary judgment motion, holding that the plaintiff did not offer sufficient evidence that the employer's conduct was discriminatorily motivated. A close review of our decisions reveals that in this circuit a plaintiff who offers substantial evidence that the employer's proffered reasons were not reliable, *see, e.g., Lindahl v. Air France,* 930 F.2d 1434, 1438-39 (9th Cir.1991), or direct evidence of discrimination, *see e.g., Cordova v. State Farm Ins.,* 124 F.3d 1145, 1150 (9th Cir.1997), has made a sufficient showing to create triable issues with respect to the employer's motivation. The plaintiff-appellant in this case did both. We therefore reverse.

BACKGROUND

The plaintiff-appellant, Marsha Godwin, had been a member of the Hunt Wesson sales force for nine years when two marketing manager positions became available in the Rosarita and Wesson brands division. Alcy Grimes, the most senior female executive for the defendant, resigned from her position as senior marketing manager for the Wesson brand, creating a vacancy. Jim Ruschman, the marketing manager for the Rosarita brand, took her position, and therefore, the Rosarita marketing manager position became available. In addition, Ruschman persuaded Ron Guthier, the Director of Marketing, to create another Wesson marketing manager position to assist Ruschman. Godwin applied for both the Rosarita and Wesson positions.

Guthier and Ruschman had primary responsibility for selecting the qualified candidates for the marketing manager positions. Guthier and Ruschman considered Godwin and Jim Rossi for the Wesson position and Godwin and Mark Smith for the Rosarita position. They selected the male candidates over Godwin for both jobs.

Although Guthier and Ruschman offer facially nondiscriminatory explanations for their selection of the male candidates, Godwin contends she has direct and circumstantial evidence to support her allegations that Guthier and Ruschman wanted to give the positions to males. She relies upon evidence that the selected candidates would reside on the almost all-male 10th floor and that the only female marketing manager on the 10th floor, Louise De PreFontaine, had caused dissension among the all-male employees, in support of her position that Guthier and Ruschman discriminatorily refused on account of her gender to consider Godwin seriously for either marketing position.

Godwin seeks general and punitive damages for gender discrimination in employment in violation of the California Fair Employment and Housing Act (FEHA) Cal. Gov't Code 33 12.900-12.955.

DISCUSSION

[1] Because California law under the FEHA mirrors federal law under Title VII, federal cases are instructive. *See Bradley v. Harcourt, Brace & Co.,* 104 F.3d 267, 270 (9th Cir.1996); *Clark v. Claremont Univ. Ctr. & Graduate Sch.,* 6 Cal.App.4th 639, 662, 8 Cal.Rptr.2d 151 (1992). We review the district court's decision to grant summary ***1220** judgment de novo. *See Lindahl,* 930 F.2d at 1436. We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether any genuine issues of material fact exist and whether the district court correctly applied the relevant substantive law. *See Cordova,* 124 F.3d at 1146.

The parties debate the required showing to create a triable issue with respect to the employer's motivation at the so-called "pretext" stage of the *McDonnell Douglas* shifting analysis. The *McDonnell Douglas* analysis imposes on the plaintiff an initial burden of establishing a prima facie case of discrimination. *McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. 1817. To establish a prima facie case, a plaintiff must offer evidence that "give[s] rise to an inference of unlawful discrimination." *Burdine,* 450 U.S. at 253, 101 S.Ct. 1089. "The prima facie case may be based either on a presumption arising from the factors such as those set forth in *McDonnell Douglas,* or by more direct evidence of discriminatory intent." *Wallis v. J.R. Simplot Co.,* 26 F.3d 885, 889 (9th Cir.1994) (citations omitted).

"The requisite degree of proof necessary to establish a prima facie case for Title VII ... on summary judgment is minimal and does not even need to rise to the level of a preponderance of the evidence." *Id.* at 889.

[2] Here, Godwin unquestionably established the *McDonnell Douglas* factors for a prima facie case: (1) she belongs to a protected class, (2) she was performing according to her employer's legitimate expectations, (3) she suffered an adverse employment action, and (4) other employees with qualifications similar to her own were treated more favorably. *See Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1109 n. 7 (9th Cir.1991); *see also McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817 (1973).

Once Godwin established her prima facie case, the burden then shifted to the defendant to articulate nondiscriminatory reasons for the allegedly discriminatory conduct. *See id.* Hunt Wesson, in its motion for summary judgment, produced evidence that it chose the male candidates because of their better experience and more "easygoing" personalities.

The employer's articulation of a facially nondiscriminatory reason shifts the burden back to the plaintiff to show that the employer's reason was a pretext for discrimination. *See St. Mary's*, 509 U.S. at 502, 113 S.Ct. 2742. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.*

The district court required Godwin to present substantial direct evidence of discrimination at the pretext stage. After reviewing our cases, we conclude that this ruling is incorrect for it conflates the standards we have articulated for two different types of evidence-circumstantial and direct-available at the pretext stage to prove discriminatory motive.

[3] Confusion is understandable, because although we have articulated two different ways in which a plaintiff may prove pretext, we have not expressly recognized the difference. Our law stems from the Supreme Court's holding that the plaintiff may establish pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256, 101 S.Ct. 1089.

We have held, clearly, that a plaintiff at the pretext stage must produce evidence in addition to that which was sufficient for her prima facie case in order to rebut the defendant's showing. *See Wallis*, 26 F.3d at 890. We have been less clear about what additional showing is required. We have said that the plaintiff "need produce very little evidence of discriminatory motive to raise a genuine issue of material fact." *Lindahl*, 930 F.2d at 1438; *see also, Strother v. Southern Cal. Permanente Med. Group*, 79 F.3d 859, 870 (9th Cir.1996) (quoting *Lindahl*); *Warren v. City of Carlsbad*, 58 F.3d 439, 443 (9th Cir.1995) (quoting *Lindahl*); *Sischo-Nownejad*, 934 F.2d at 1111 (when a plaintiff introduces "direct or circumstantial" evidence "a factual question will almost always exist with respect to any claim of a nondiscriminatory ***1221** reason"); *Lowe v. City of Monrovia*, 775 F.2d 998, 1009 (9th Cir.1985) ("[a]ny indication of discriminatory motive ... may suffice to raise a question that can only be resolved by a factfinder").

We have also said, however, that the plaintiff must produce "specific, substantial evidence of pretext." *See Bradley*, 104 F.3d at 270; *Collings v. Longview Fibre Co.*, 63 F.3d 828, 834 (9th Cir.1995); *Wallis*, 26 F.3d at 890; *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir.1983); *see also, Tarin v. County of Los Angeles*, 123 F.3d 1259, 1264 (9th Cir.1997) ("plaintiff must prove by a preponderance of the evidence that the proffered reasons are pretexts" in a Title VII retaliation case); *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918 (9th Cir.1996) (evidence must be "sufficiently probative").

[4] [5] These apparently differing standards, however, are reconcilable, for they depend upon the nature of the plaintiff's evidence. When the plaintiff offers direct evidence of discriminatory motive, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial. As we said in *Lindahl*, it need be "very little." *Lindahl*, 930 F.2d at 1438 (direct evidence of sexual stereotyping where employer believed that the female candidates get "nervous" and "easily upset"); *see also Cordova*, 124 F.3d at 1150 (direct evidence of race discrimination where employer referred to a Mexican-American employee as a "dumb Mexican."); *Sischo-Nownejad*, 934 F.2d at 1111 (direct evidence of sex stereotyping where employee referred to female plaintiff as "an old warhorse" and to her students as "little old ladies"). "Direct evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption." *Davis v. Chevron, U.S.A., Inc.*, 14 F.3d 1082, 1085 (5th Cir.1994) (alterations in original, quotations and citations omitted).

[6] As did the plaintiffs in *Cordova* and *Lindahl*, Godwin produced evidence of direct discrimination. *See Cordova*, 124 F.3d at 1150; *Lindahl*, 930 F.2d at 1438. She presented a statement made by Ruschman to Hunt Wesson's national sales manager, Bernie Stipetic, that Guthier "did not want to deal with another female after having dealt with ...

Louise De PreFontaine." This comment directly suggests the existence of bias and no inference is necessary to find discriminatory animus. *See Cordova,* 124 F.3d at 1149; *Davis,* 14 F.3d at 1085.

[7] Hunt Wesson raises a number of arguments to counter that evidence, but none are availing at this stage. Hunt Wesson is incorrect in asserting that this statement is inadmissable hearsay. We have held that an admission by an agent within the scope of his employment is admissable. *See Breneman v. Kennecott Corp.,* 799 F.2d 470 (9th Cir.1986) (multiple hearsay is admissable if each of the speakers was involved in the employer's decision). Hunt Wesson also disputes that Stipetic was involved in the employment decision, but this dispute is for the trier of fact to resolve. Furthermore, the comment is not a "stray remark" that is "uttered in an ambivalent manner and [is] not tied directly to [the plaintiff]'s termination," which we have held to be insufficient. *See Merrick v. Farmers Ins. Group,* 892 F.2d 1434 (9th Cir.1990); *Nesbit v. Pepsico, Inc.,* 994 F.2d 703, 705 (9th Cir.1993) (statement of corporate officer having no direct relationship to plaintiff that "[W]e don't necessarily like grey hair" in age discrimination suit not sufficient to withstand summary judgment); *Nidds,* 113 F.3d at 918-19 (employer's "old timers" comment was ambivalent and not tied to termination and thus insufficient to establish age discrimination). Ruschman's comment was not ambivalent and it is related directly to the positions that Godwin sought.

The record also contains direct evidence of discriminatory animus toward women as employees. Alcy Grimes, the former senior marketing manager for the Wesson brand, testified that while she was giving a presentation at a sales meeting, someone gave her a "Barbie doll kit" containing two dildos and a bottle of Wesson oil. She also testified that the company sponsored hunting and fishing trips to which she was not invited and other women did not attend. Godwin testified that the president of the company, Marshall Ransam, made derogatory comments about women at meetings. In sum, Godwin's direct evidence of discriminatory animus satisfies the required showing at the pretext stage. *See Cordova,* 124 F.3d at 1149.

***1222** [8] [9] In those cases where direct evidence is unavailable, however, the plaintiff may come forward with circumstantial evidence that tends to show that the employer's proffered motives were not the actual motives because they are inconsistent or otherwise not believable. Such evidence of "pretense" must be "specific" and "substantial" in order to create a triable issue with respect to whether the employer intended to discriminate on the basis of sex. *See Bradley,* 104 F.3d at 270 (no evidence beyond that produced for the prima facie case presented); *Collings,* 63 F.3d at 834 (no evidence beyond that produced for the prima facie case presented); *Wallis,* 26 F.3d at 890 (no evidence beyond that produced for the prima facie case); *see also Nidds,* 113 F.3d at 918 (circumstantial evidence of shifting explanations are not "sufficiently probative").

In this case, Godwin did show substantial evidence of the unreliability of the reasons proffered by the employer. All of the evidence supporting the employer's proffered reasons came from statements, depositions, and declarations prepared after the employment decision was made and while this litigation was in progress. This alone is not disqualifying. "Simply because an explanation comes after the beginning of litigation does not make it inherently incredible." *Lindahl,* 930 F.2d at 1438. The evidence in this record of the contemporaneous reasons for the selection of the male applicant, however, is inconsistent in material ways with the statements upon which the employer relies.

In their declarations prepared for litigation, Guthier and Ruschman explain that they selected Rossi for the Wesson position because he had demonstrated creativity in marketing and they believed he would work well with both sales and marketing personnel. They explain further that they did not select Godwin because Guthier had concerns about Godwin's ability to get along with Ruschman and the sales force. As to the Rosarita position, Guthier and Ruschman assert that they selected Smith not only because of his marketing experience, but also because of his easygoing personality.

Although the employer's declarations and depositions indicate that "creativity" was the most important criterion for selecting the male Wesson marketing manager, the criterion of "creativity" does not appear in the contemporaneous memorandum prepared at the time of the selection. Although "shifting explanations are acceptable when viewed in the context of other surrounding events ... such weighing of the evidence is for a jury, not a judge." *Payne v. Norwest Corp.,* 113 F.3d 1079, 1080 (9th Cir.1997).

Moreover, the recommendations received during the review of Godwin described her repeatedly as getting along well with others and also referred to her as being "creative." In fact, the only negative recommendations with respect to Godwin's personality in the contemporaneous notes of her application reflect an inability to get along with persons on the "tenth floor." The tenth floor housed all the marketing executives' offices. Because all of the marketing executives were male with only one exception, we cannot assume those generic negative references are necessarily gender neutral.

Godwin also presented evidence that one of the male candidates had received poor evaluations on his personality. Facts tending to show that the chosen applicant may not have been the best person for the job are probative as they "suggest that [the explanation] may not have been the real reason for choosing [the chosen applicant] over the [plaintiff]." *Lindahl,* 930 F.2d at 1439.

Godwin's indirect evidence of discriminatory motive, as well as her direct evidence was sufficient to raise genuine issues of fact as to whether Hunt Wesson's nondiscriminatory explanations were the true reasons or whether they masked discriminatory motives. *See St. Mary's,* 509 U.S. at 502, 113 S.Ct. 2742; *Washington v. Garrett,* 10 F.3d 1421, 1433 (9th Cir.1993). We therefore conclude that summary judgment should not have been granted.

CONCLUSION

The district court's decision is REVERSED and REMANDED. Each side shall bear its own costs on appeal.

Parallel Citations

80 Fair Empl.Prac.Cas. (BNA) 890, 98-2 USTC P 45,470, 98 Cal. Daily Op. Serv. 6275, 98 Cal. Daily Op. Serv. 6783, 98 Daily Journal D.A.R. 8677, 98 Daily Journal D.A.R. 9447

Footnotes

* Judge FLETCHER was drawn to replace Judge Gibson. She read the briefs and listened to a tape of oral argument held on April 8, 1998.

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48 F.3d 22
United States Court of Appeals, First Circuit.

Harvey R. GREENBERG, Plaintiff, Appellant,
v.
UNION CAMP CORPORATION, Defendant, Appellee.

No. 94-1312. | Heard Nov. 9, 1994. | Decided Feb. 17, 1995.

Former sales representative brought suit against employer alleging that employer violated the Age Discrimination in Employment Act (ADEA) by constructively discharging him, and further violated the Act by retaliating against him for invoking his ADEA rights. The United States District Court for the District of Massachusetts, Edward F. Harrington, J., granted directed verdict in favor of employer, and plaintiff appealed. The Court of Appeals, Stahl, Circuit Judge, held that: (1) plaintiff did not establish that he was constructively discharged when employer required him to spend two additional days a week making sales calls in his sales territory, and (2) plaintiff did not establish that employer acted with a retaliatory motive in requiring plaintiff to work five days a week in his sales territory.

Affirmed.

West Headnotes (2)

[1] **Civil Rights**
Constructive Discharge

Former sales representative failed to establish in age discrimination suit that he was constructively discharged when employer required him to spend two additional days a week making sales calls in his sales territory; plaintiff did not assert that new conditions would be humiliating or demeaning, and it was not unreasonable for employer to expect sales representatives to spend their work days making sales calls; moreover, single inquiry concerning plaintiff's retirement plans, and fact that no employee over age 40 had been hired in Maine plant during tenure of plant manager was not sufficient evidence of discriminatory animus to substantiate constructive discharge claim.

53 Cases that cite this headnote

[2] **Civil Rights**
Particular Cases

Former sales representative did not establish that employer acted in retaliation against him for invoking his ADEA rights when employer required plaintiff to work five days a week, rather than three days as formerly, in his sales territory; rather, order was inexorable result of plaintiff's persistence in refusing to modify his work schedule. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

22 Cases that cite this headnote

Attorneys and Law Firms

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John T. Murray, with whom Jeffrey K. Ross, Seyfarth, Shaw, Fairweather & Geraldson, Chicago, IL, John A. Nadas, Kevin P. Light, Karen L. Cartotto and Choate, Hall & Stewart, Boston, MA, were on brief, for appellee.

Before CYR, Circuit Judge, BOWNES, Senior Circuit Judge, and STAHL, Circuit Judge.

Opinion

STAHL, Circuit Judge.

Plaintiff-appellant Harvey Greenberg appeals from a directed verdict granted in favor of defendant-appellee Union Camp on Greenberg's claims of wrongful termination due to age and retaliatory discrimination. Because Greenberg failed to adduce sufficient evidence to support a finding of constructive discharge or retaliatory motive, we affirm.

*23 *I.*

Background

In October of 1971, Harvey Greenberg, at age thirty-five, began working as a sales representative for Union Camp.1 Union Camp hired Greenberg primarily to cover the Maine sales territory for its Dedham, Massachusetts, plant. Union Camp manufactures (and Greenberg sold) corrugated cardboard boxes for industrial and commercial use. Throughout his career at Union Camp, Greenberg resided in Swampscott, Massachusetts.
When Union Camp hired Greenberg, it had virtually no existing customer base in the State of Maine. Greenberg initially spent one week a month prospecting for new accounts in Maine and the rest of the month selling to existing Massachusetts customers. Greenberg, however, successfully built up Union Camp's client base in Maine and in short order concentrated his sales efforts almost exclusively in Maine. Indeed, Greenberg was primarily responsible for securing the Maine client base which was a prerequisite for Union Camp to open a corrugated container plant in Auburn, Maine. By 1977, Union Camp's client base in Maine had grown such that Greenberg's sales territory was narrowed to approximately the southern half of the State of Maine.2

Greenberg increased his sales every year, from $190,000 in 1972 to over $5,400,000 in 1989. Greenberg's profit contribution (roughly a measure of how much money Union Camp earned on the sales) consistently compared very favorably with that of other Union Camp sales representatives. Moreover, at least by some measures, Greenberg successfully sold not only to established accounts, but also to new customers.3 Greenberg received annual pay increases with his compensation rising from about $12,500 in 1972 to almost $65,000 in 1989. In July of 1990, at his annual performance review, Greenberg, who like all Union Camp sales representatives worked on a salary rather than a commission basis, received the largest merit increase of his career.

Throughout most of his nineteen years at Union Camp, Greenberg called on his Maine customers only on Tuesdays, Wednesdays and Thursdays. He attributed this work schedule, at least in part, to his basic sales philosophy that prospective customers were generally too busy for and unreceptive to sales pitches on Mondays and Fridays. During a typical week, Greenberg would leave his home in Massachusetts at 5:30 a.m. on Tuesdays, meet his first customer in Maine at 7:00 a.m. and continue to make sales calls until around 3:00 p.m., when he would check into a motel where he would spend Tuesday and Wednesday nights. Often he would entertain clients on the company expense account during the evenings. Wednesdays, he typically left his hotel at 8:00 a.m. and would call on customers until the middle of the afternoon. On Thursdays starting sometime after 8:00 a.m., he would visit customers while working his way back to Massachusetts, generally arriving home sometime near the middle of the afternoon.

Early in his career, Greenberg reported to the Dedham, Massachusetts, plant on Mondays to speak to supervisors, turn in expense reports and meet with box designers about customer orders. After Greenberg began reporting to the Maine plant in 1983, he still periodically went to the Dedham plant to work with designers until the facility closed around 1986. From 1986 until he left the company, Greenberg generally worked out of *24 his home on Mondays and Fridays, completing paperwork4 and making telephone calls to the plant and to customers. Greenberg normally finished this work before noon, usually leaving the rest of the day for personal matters. Greenberg periodically did visit a New Hampshire customer on Mondays.

In 1987, Union Camp assigned Gerald Redman to the Auburn, Maine, plant as plant manager. In the summer of 1987 at Greenberg's annual performance review, Redman told Greenberg that, "[y]our reputation goes all the way to Wayne [(Union Camp's headquarters)], you don't work Monday and Friday. If it ever gets to be a problem, I will be the first to tell you about it." Bob Ritter, the Maine plant sales manager, testified that, at this meeting and at Greenberg's 1988 performance review, Greenberg stated that he intended to retire at age fifty-five.
In November 1989, Redman and Ritter required Greenberg and the other sales representatives to make presentations regarding their top five new-account prospects. Redman was extremely dissatisfied with Greenberg's performance at his individual meeting, and Greenberg described the meeting as "two hours of insults and threats." At one point during the meeting, Greenberg stated, "I don't have to listen to this garbage anymore," and threatened to walk out. At another, Greenberg commented to Redman that there seemed to be "[a] sword of [D]amocles hanging over my head in my best sales year." To which Redman responded, "You'd better believe it." Ritter testified that at this meeting he told Greenberg that his three-day schedule was not satisfactory. Though Greenberg maintained that he was not ordered at this point to make sales calls on Mondays and Fridays, he admitted that his work schedule may have been discussed. Following the meeting, Greenberg avoided speaking with Redman and Ritter except as business required.5

Greenberg asked Ritter to visit some customers with him in February of 1990. During the trip, the two discussed the previous November meeting. Greenberg testified that they

also discussed Greenberg's own belief that Union Camp's sales force was too old.6 He also admitted that they may have discussed his work schedule and sales philosophy, but he did not specifically recall.

At a meeting in May 1990, Ritter asked Greenberg, who would turn fifty-four the following July, whether he had plans to retire early at age fifty-five. Though Greenberg testified that he had never told anyone at Union Camp that he intended to retire early, he admitted that a story he often told about his father might have suggested that he wished to do so.7 During the meeting, Greenberg told Ritter that there was no way he could afford to retire early. Directly following the meeting, Ritter informed Redman that Greenberg did not intend to retire early. Redman testified that this fact increased the need to do something about Greenberg's work schedule.

In July 1990, Ritter gave Greenberg his annual review, at which he told Greenberg ***25** about his raise, which was the largest of Greenberg's career, and about areas of his job performance that needed improvement. Following the meeting, Ritter sent Greenberg a letter purporting to summarize the main points of the review. Ritter noted in the letter that he had informed Greenberg that he must show improvement "in the immediate future" in areas of "base accounts, new account development, communication with management, work schedules, expenses and communication." More specifically, Ritter wrote:

> New account penetration in recent years has been unsatisfactory. Regardless of base account level, new account focus, planning and development must improve. Work habits and methods must be reviewed with action taken to better utilize open available weekly time to achieve job responsibilities. Not communicating with management because of the difference of opinion is unacceptable, and actions such as these cannot occur again.

Greenberg testified that he could not recall Ritter counselling him about any significant performance problems in past reviews.8

Greenberg responded with a four-page missive of his own, dispatched to Ritter and Redman, in which he contested the substance of Ritter's complaints. Though Greenberg testified at trial that the fact that he only called on customers on Tuesdays, Wednesdays and Thursdays was not discussed at his review, in his letter he specifically responded: "[']Work habits and methods [(referring to Ritter's letter)]....['] We have talked about this before and my position has never changed.... It's been my experience that successful salesmen have different methods and if they are successful they should be rewarded [and] not made to walk to the same beat of some drummer." (Second ellipsis added).

Redman replied to Greenberg with a short letter stating:

> We received your letter of August 18, 1990, and we would prefer not to continue a letter writing exchange regarding your Sales Philosophy.
>
> Bob Ritter's memo of August 8, 1990 was written to document the fact that your performance has not been up to expected standards in the areas of: expenses, expense reporting, communications, work schedules and new account penetration. The memo also intended to emphasize the seriousness of continued resistance to change and critical opposition to suggestions for improvement.

After receiving this letter, Greenberg consulted a lawyer, who, on September 13, 1990, wrote to Redman's superior suggesting that Greenberg was being subjected to age discrimination. On September 19, 1990, shortly after Union Camp received this letter, Redman and Ritter met with Greenberg and informed him that, from that point on, he was expressly required to spend five days a week in his sales territory. Greenberg requested time to consider this requirement and Redman agreed, telling Greenberg to " 'take time to think about it.' "

Finally, at a meeting nearly a month later on October 15, 1990, Greenberg refused to sign a letter that explicitly listed six conditions of employment that he would be required to meet, including the five-days-in-the-sales-territory requirement.9 Greenberg's ***26** decision not to sign the letter ended his employment relationship with Union Camp. Subsequently, no other sales representative, including Greenberg's replacement, was required to sign a similar document. Moreover, Union Camp has never made five days in the sales territory an explicit job requirement for any other sales representative.

Greenberg brought this action in the district court alleging that Union Camp terminated his employment in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. Greenberg alleged that Union Camp's actions were motivated by an anti-age animus and a desire to retaliate against Greenberg for seeking to invoke his ADEA-protected rights. Following the close of Greenberg's case, the district court granted Union Camp's motion for a directed verdict, holding that Greenberg had failed to show any evidence of age discrimination and that Union Camp "did not terminate [Greenberg] but that [Greenberg] left [Union Camp's] employment because he

blatantly refused to work five days a week in the territory of Maine as required by his employer." This appeal followed.

II.

Discussion

We review *de novo* a district court's decision to grant a motion for a directed verdict (or more properly judgment as a matter of law), employing the "same stringent standard incumbent upon the trial court in the first instance." *Favorito v. Pannell,* 27 F.3d 716, 719 (1st Cir.1994). In performing this task, we take the evidence and all reasonable inferences therefrom in the light most favorable to the party opposing the motion and ask whether a rational jury could find in that party's favor. *E.g., Murray v. Ross-Dove Co.,* 5 F.3d 573, 576 (1st Cir.1993).

A. Age Discrimination Claim

[1] In a wrongful termination case under the ADEA, the plaintiff must establish " 'that his years were the determinative factor in his discharge, that is, that he would not have been fired but for his age.' " *Mesnick v. General Elec. Co.,* 950 F.2d 816, 823 (1st Cir.1991) (quoting *Freeman v. Package Mach. Co.,* 865 F.2d 1331, 1335 (1st Cir.1988)), *cert. denied,* --- U.S. ----, 112 S.Ct. 2965, 119 L.Ed.2d 586 (1992); *see also Vega v. Kodak Caribbean, Ltd.,* 3 F.3d 476, 478 (1st Cir.1993). Where direct evidence of discriminatory animus is lacking, the burden of producing evidence is allocated according to the now-familiar *McDonnell Douglas* framework. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-05, 93 S.Ct. 1817, 1824-26, 36 L.Ed.2d 668 (1973); *Sanchez v. Puerto Rico Oil Co.,* 37 F.3d 712, 719 (1st Cir.1994).

Under the *McDonnell Douglas* framework, the employee must initially come forward with sufficient evidence to establish a prima facie case of discriminatory discharge. Thus, here, Greenberg needed to establish that (i) he is a member of a protected class, *i.e.,* over forty years of age, (ii) his job performance was sufficient to meet Union Camp's legitimate job expectations, (iii) he was actually or constructively discharged, and (iv) Union Camp sought a replacement with roughly equivalent qualifications. *Vega,* 3 F.3d at 479; *see also Sanchez,* 37 F.3d at 719. Once the plaintiff has met this relatively light burden, a presumption of discrimination arises and the onus is then shifted to the employer to articulate a legitimate, nondiscriminatory reason for its actions. *Mesnick,* 950 F.2d at 823. If the employer produces such a justification, the presumption of discrimination vanishes and the burden shifts back to the plaintiff to show that the employer's alleged justification is merely pretext for discrimination. ***27** *Woods v. Friction Materials, Inc.,* 30 F.3d 255, 260 (1st Cir.1994).

Greenberg's termination claim fails at the outset, however, because he has not adduced sufficient evidence from which a jury could reasonably conclude that he was constructively discharged. Greenberg maintains that Union Camp constructively discharged him by requiring him to sign the October 15 letter, which explicitly listed six job requirements that he needed to fulfill. Except for the requirement that he make sales calls in his territory five days a week, Greenberg testified that he was substantially complying with the conditions listed in the letter. Primarily, Greenberg contends that, by requiring him to spend two additional days a week making sales calls in Maine, Union Camp constructively discharged him. We disagree.

It is well settled in this Circuit that, to establish a claim of constructive discharge, the evidence must support a finding that " 'the new working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.' " *Calhoun v. Acme Cleveland Corp.,* 798 F.2d 559, 561 (1st Cir.1986) (quoting *Alicea Rosado v. Garcia Santiago,* 562 F.2d 114, 119 (1st Cir.1977)); *see also Vega,* 3 F.3d at 480 (new conditions must make work so "arduous," "unappealing" or "intolerable" that a reasonable person would resign). The legal standard to be applied is "objective," with the inquiry focused on "the reasonable state of mind of the putative discriminatee." *Calhoun,* 798 F.2d at 561 (internal quotations omitted). Consequently, "an employee may not be unreasonably sensitive to his or her working environment." *Id.* (internal quotations omitted); *see also Vega,* 3 F.3d at 476.

Within the context of this case, we believe that no rational jury could find that requiring Greenberg to spend two additional days in Maine making sales calls to be so intolerable that a reasonable person in Greenberg's shoes would have felt compelled to resign. Initially, we note that Greenberg does not assert that the new conditions would be humiliating or demeaning, often an important factor in evaluating a claim of constructive discharge. *See, e.g., Aviles-Martinez v. Monroig,* 963 F.2d 2, 6 (1st Cir.1992) (sufficient evidence to find constructive discharge where evidence included scolding and ridiculing plaintiff in front of clients on a daily basis). Moreover, in explicitly imposing the six conditions on Greenberg, Union Camp did not demote Greenberg or reduce his pay or total compensation. *See, e.g., Goss v. Exxon Office Sys. Co.,* 747 F.2d 885, 888-89 (3d Cir.1984) (constructive discharge where, along with other factors, change in sales

representative's territory constituted substantial cut in pay); *cf. Nunez-Soto v. Alvarado,* 918 F.2d 1029, 1030-31 (1st Cir.1990) (demotion without salary cut insufficient for constructive discharge). Indeed, at his July 1990 review, just prior to imposing the conditions of employment, Union Camp gave Greenberg the largest merit increase of his career. In effect, Greenberg contends that the requirement is intolerable because it would require him to spend more time on the road, and possibly (though not necessarily) another weeknight or two away from home. In the context of this case, this is not enough.

Greenberg was a sales representative. It is hardly unreasonable for an employer to expect its sales representatives to spend their workdays making sales calls. That calling on his customers meant spending time on the road is more an unhappy aspect of Greenberg's vocation than an unreasonable or intolerable working condition. *See Bristow v. Daily Press, Inc.,* 770 F.2d 1251, 1254-56 (4th Cir.1985) (no constructive discharge where conditions, though unpleasant, are part and parcel to the job), *cert. denied,* 475 U.S. 1082, 106 S.Ct. 1461, 89 L.Ed.2d 718 (1986).

Requiring Greenberg to spend two additional days in Maine appears burdensome only if we focus narrowly on the fact that Greenberg resides in Massachusetts. The degree to which requiring Greenberg to work two additional days in Maine is unreasonable, however, must be measured within the context of this case. Union Camp originally hired Greenberg specifically to be its sales representative for the State of Maine. Therefore, Greenberg, who lived in Massachusetts at the time, accepted employment knowing that he was hired to sell to Maine ***28** customers.[10] Thus, this case is distinguishable from one in which an employee who lives and works in one city is offered the choice between termination and a transfer to another city. *See Hazel v. United States Postmaster Gen.,* 7 F.3d 1, 5 (1st Cir.1993) (suggesting that transfer from one city to another would support finding of constructive discharge); *but see Cherchi v. Mobil Oil Corp.,* 693 F.Supp. 156, 162-64 (D.N.J.) (no constructive discharge where employer offered transfer from New Jersey to Baltimore), *aff'd,* 865 F.2d 249 (3d Cir.1988). Because Greenberg voluntarily chose to work as the sales representative for the Maine territory, while living in Massachusetts, he cannot now complain of changes in his work schedule that would not be burdensome but for that choice.

Nonetheless, Greenberg makes much of the fact that Union Camp did not explicitly impose the mandatory five-day-a-week-sales-call condition on any of its other sales representatives or his younger replacement. He argues that this disparate treatment amply supports a finding of constructive discharge. Union Camp officials, however, all testified that the condition was a basic, albeit unwritten, requirement of the sales representative position. Moreover, Greenberg does not point to any other sales representative who similarly made calls in his or her assigned territory only three days a week that Union Camp treated differently. At most, Greenberg elicited testimony from his replacement that, due to the need to finish paperwork, handle customer requests and/or complaints, and tend to other vagaries of the job, he occasionally passed a day without making sales calls, but nonetheless was not required to sign a similar conditions-of-employment statement. This evidence is insufficient. *See Smith v. Stratus Computer, Inc.,* 40 F.3d 11, 17 (1st Cir.1994) ("In a disparate treatment case, the plaintiff has the burden of showing that she was treated differently from persons situated similarly *in all relevant aspects.*" (internal quotations omitted)).[11]

Moreover, our conclusion is buttressed by the fact that Greenberg couples his allegation of constructive discharge with virtually no evidence that Union Camp's motives stemmed from an animosity towards age. Direct or circumstantial evidence of a discriminatory animus could help substantiate a claim that one's working conditions had become intolerable to an unreasonable degree. *See, e.g., Acrey v. American Sheep Indus.,* 981 F.2d 1569, 1574-75 (10th Cir.1992) (employer request that employee quit on account of age cited as evidence of both animus towards age and unreasonable working conditions); *Goss,* 747 F.2d at 888 (verbal abuse that conveyed animosity towards employee's gender supported finding of constructive discharge). As evidence of age discrimination, Greenberg, however, essentially points to just two factors-(1) the single May 1990 inquiry concerning Greenberg's retirement plans, and (2) the fact that no employee over age forty had been hired by Union Camp at the Maine plant during Redman's tenure as plant manager.

A single inquiry by an employer as to an employee's plans for retirement, however, does not necessarily show animosity towards age. *See Colosi v. Electri-Flex Co.,* 965 F.2d 500, 502 (7th Cir.1992). An employer may legitimately inquire about an employee's plans so that it can prepare to meet its hiring needs. Though repeated and/or coercive inquiries can clearly give rise to a reasonable inference of an anti-age bias (and lend support ***29** to a finding of constructive discharge), *see Calhoun,* 798 F.2d at 562-63 (three inquires over seven months coupled with demotion requiring employee to report to younger person employee had previously trained, and threat of onerous working conditions if no resignation), that is not the case here. Greenberg alleges only that Ritter made a single inquiry at the May 1990 meeting as to whether Greenberg had plans to retire at age fifty-five. Moreover, though Greenberg testified that he never told

Ritter or Redman that he intended to retire early, he admitted that an anecdote he frequently recounted could have led them to think he desired to do so.

The fact that Union Camp's Maine plant did not hire any employees over age forty during Redman's tenure as plant manager adds little to Greenberg's claim. As we have noted before, without any attempt to establish the demography of the available hiring pool, this evidence has little probative value. *See LeBlanc v. Great Am. Ins.*, 6 F.3d 836, 848 (1st Cir.1993), *cert. denied,* 511 U.S. 1018, 114 S.Ct. 1398, 128 L.Ed.2d 72 (1994); *cf. Goldman v. First Nat'l Bank of Boston,* 985 F.2d 1113, 1119 n. 5 (1st Cir.1993). Moreover, Greenberg offered no evidence at trial concerning the number of employees actually hired, thus precluding any reasonable evaluation of the statistical data in terms of sample size. Finally, that two years after his departure three of seven sales representatives employed at the Maine plant were over age forty, and that Redman, himself, was five years older than Greenberg, makes any inference of animosity towards age on this evidence dubious at best. Therefore, Greenberg's proffered evidence of anti-age bias provides little support for his claim of intolerable working conditions and consequent constructive discharge, and thus his age-bias claim falls short.

B. Retaliatory Claim

[2] Greenberg's claim of retaliatory discrimination likewise fails because no rational jury could conclude on this evidence that Union Camp acted with a retaliatory motive in requiring Greenberg to work five days a week in his sales territory. *See Mesnick,* 950 F.2d at 827 (plaintiff must show that employer's reason for adverse action taken against employee is pretext masking retaliation for employee invoking his ADEA-protected rights). Even taking the evidence in the light most favorable to Greenberg, it is clear that his work schedule had been an issue with his superiors at Union Camp since at least the November 1989 meeting. Moreover, it is not disputed that Greenberg did not adjust his work schedule in response to the August 8 letter, in which Ritter unequivocally wrote, "Work habits and methods must be reviewed with action taken to *better utilize open available weekly time to achieve job responsibilities.*" (Emphasis added).

Greenberg responded to this directive with his own letter stating, "*We have talked about this before and my position has never changed....* It's been my experience that successful salesmen have different methods and if they are successful they should be rewarded [and] not made to walk to the same beat of some drummer." (Emphasis added). Furthermore, Redman's August 28 letter clearly warned Greenberg that Ritter's letter "was written to document the fact that [Greenberg's] performance ha[d] not been up to expected standards in the areas of: expenses, expense reporting, communications, *work schedules* and new account penetration." Redman concluded by stating that Ritter's letter was "intended to emphasize the *seriousness of continued resistance to change and critical opposition to suggestions for improvement.*" (Emphasis added).

Any rational view of these interchanges makes clear that Greenberg's continued refusal to adapt his work schedule would result in further action by Union Camp. Hence, no rational jury could conclude that the September 19 order directing Greenberg to spend five days a week in his sales territory ensued because Union Camp sought to retaliate against Greenberg for invoking his ADEA rights. Rather, the order was the inexorable result of Greenberg's persistence in refusing to modify his work schedule. *See Mesnick,* 950 F.2d at 828 (ADEA should not permit a disgruntled employee to "inhibit a well-deserved discharge [or other sanction] by ***30** merely filing, or threatening to file, a discrimination complaint.").

III.

Conclusion

In sum, because Greenberg failed to adduce sufficient evidence to support a finding of constructive discharge or retaliatory motive, the district court did not err in granting Union Camp's motion for a directed verdict on the claims of age and retaliatory discrimination. Accordingly, the decision of the district court is

affirmed.

Parallel Citations

67 Fair Empl.Prac.Cas. (BNA) 120, 129 Lab.Cas. P 57,842

Footnotes

1 In 1971, the entity that retained Greenberg was a subsidiary of Union Camp operating under the name Allied Container. About 1985, the Allied Container subsidiary adopted the Union Camp logo. For purposes of this opinion, we will refer to Greenberg's employer, whether before or after 1985, as Union Camp.

2 By 1977, Greenberg had essentially discontinued calling on any Massachusetts customers.

3 The parties disputed Greenberg's performance in securing and selling new accounts. In maintaining that he performed well in this area, Greenberg pointed out that he ranked third, second and first for the years 1987, 1988 and 1989, respectively, in terms of square feet of corrugated cardboard sold to new accounts. Union Camp, on the other hand, pointed to other measures, that indicated whether the new-account customers were one-time purchasers or became recurring customers, which shed a less favorable light on Greenberg's performance.

4 The paperwork consisted of expense and sales-call reports. Greenberg testified that, for the last several years of his career, he filled out identical sales-call reports every other week. He stated that, though in general they reflected his activities, they did not accurately state on a day-to-day basis the clients he visited.

5 Greenberg also testified that his expenses were discussed during this meeting. He recalled stating "I never pocketed a nickel." Redman replied, "It better be that way."

At trial, Greenberg admitted that he often entertained individuals who were not Union Camp customers and later attributed the cost of the entertainment on his expense reports to actual clients. Greenberg resolutely maintained, however, that the expenditures always benefitted Union Camp, albeit sometimes indirectly.

6 Greenberg had previously brought this point to both Redman and Ritter's attention. Deposition testimony of Greenberg's replacement read into the record at trial established that, at the time of the deposition, three of seven sales representatives at the Maine plant were older than age forty. Though not elicited as a fact in Greenberg's case-in-chief, Redman, who testified and was present for the four days of trial, is five years older than Greenberg.

7 Greenberg's written performance reviews dated February 1989 and February 1990, include the statement "Retirement in the near future," under a section entitled "Career Development." Greenberg neither signed nor saw these reviews prior to leaving the company.

8 Greenberg's unsigned performance reviews from 1987 to 1990 rate him as either an excellent or effective employee. Areas needing attention or improvement, however, are listed as "[p]rospecting and attention to detail" (February 1987); "time in marketplace, tolerance/understanding to differing opinions" (April 1987); "[a]cknowledgement and adaptability to changing conditions. Time Management and prospecting" (February 1989); "[a]cknowledgement & adaptability to changing conditions. Time management and prospecting." (February 1990). The February 1990 review also states, "Salesman understands consequences of performance level drop with present inclination not to change work methods & time management issues presented to him."

9 The six conditions were stated as follows:

1. You must present a plan analyzing your top 10 new account prospects as to total dollar potential, how each account fits our mix and volume profile, our present sales position with each project, and an immediate action plan for penetrating the accounts.
2. Call the Sales Manager or General Manager every Monday, Wednesday, and Friday (or on a daily basis whenever conditions warrant) to communicate account problems or concerns, review competitor actions, and update management on market conditions.
3. Provide Sales Manager with written feedback on customer reaction to quotations within 30 days of the quotations being issued.
4. Increase weekly sales calls from current average of 12-13 to a minimum of 20 per week.
5. Maintain 5 day sales schedule in your territory and be actively involved in making customer calls Monday through Friday.
6. Accurately report expenses incurred in entertaining customers. Reduce customer entertainment expenses by 15% in July through December, 1990 from January through June, 1990's expenses.

10 Nowhere does Greenberg assert that he originally accepted employment with Union Camp on the condition that he spend no more than three days a week calling on Maine customers.

11 Greenberg relies on *Hazen Paper Co. v. Biggins*, 507 U.S. 604, ----, 113 S.Ct. 1701, 1708, 123 L.Ed.2d 338 (1993), which he asserts establishes that an employee who refuses to sign an onerous job contract not imposed on a younger replacement is constructively discharged. While this premise may be true (though we do not agree that the Supreme Court specifically addressed the issue), Greenberg has failed to show that the "contract" here was sufficiently onerous. In *Hazen*, the contract included a non-compete clause that would have prohibited the employee, who was a trained chemist, from working in his field of expertise for two years after leaving the company. *Biggins v. Hazen Paper Co.*, 953 F.2d 1405, 1411 (1st Cir.1992), *vacated*, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993). Union Camp sought no such restriction on Greenberg's future employment.

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129 S.Ct. 2343
Supreme Court of the United States

Jack GROSS, Petitioner,
v.
FBL FINANCIAL SERVICES, INC.

No. 08–441. | Argued March 31, 2009. | Decided June 18, 2009.

Synopsis

Background: Employee brought action against employer under Age Discrimination in Employment Act (ADEA), alleging he was demoted because of his age. The United States District Court for the Southern District of Iowa, Thomas J. Shields, J., rendered judgment on jury verdict for employee. Employer appealed. The United States Court of Appeals for the Eighth Circuit, Colloton, Circuit Judge, 526 F.3d 356, reversed. Certiorari was granted.

[Holding:] The Supreme Court, Justice Thomas, held that mixed-motives jury instruction is never proper in ADEA case.

Vacated and remanded.

Justice Stevens filed dissenting opinion, in which Justices Souter, Ginsburg and Breyer joined.

Justice Breyer filed dissenting opinion, in which Justices Souter and Ginsburg joined.

West Headnotes (7)

[1] **Federal Courts**
Review on Certiorari

Although petition for certiorari, asking Supreme Court to decide whether a plaintiff had to present direct evidence of discrimination in order to obtain mixed-motive instruction in a non-Title VII discrimination case, did not specifically frame the question to include threshold inquiry of whether burden of persuasion ever shifted to party defending alleged mixed-motives discrimination claim brought under ADEA, statement of question presented was deemed to comprise every subsidiary question fairly included therein. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.
601 Cases that cite this headnote

[2] **Statutes**
Construction with Reference to Other Statutes

When conducting statutory interpretation, Supreme Court must be careful not to apply rules applicable under one statute to different statute without careful and critical examination.

10 Cases that cite this headnote

[3] **Statutes**
Amendatory and amended acts

When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.

3 Cases that cite this headnote

[4] **Statutes**
Implications and inferences

Negative implications raised by disparate statutory provisions are strongest when provisions were considered simultaneously when language raising the implication was inserted.

2 Cases that cite this headnote

[5] **Civil Rights**
Motive or intent; pretext
Civil Rights
Disparate treatment
Civil Rights
Age discrimination

ADEA does not authorize mixed-motives age

discrimination claim, since ordinary meaning of ADEA's requirement that employer took adverse action "because of" age is that age was the "reason" that employer decided to act; therefore, to establish disparate-treatment claim, plaintiff must prove that age was "but-for" cause of employer's adverse decision, and burden of persuasion does not shift to employer to show that it would have taken the action regardless of age, even when plaintiff has produced some evidence that age was one motivating factor in that decision. Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1).

632 Cases that cite this headnote

[6] **Statutes**
Meaning of Language

Statutory construction must begin with language employed by Congress and assumption that ordinary meaning of that language accurately expresses legislative purpose.

23 Cases that cite this headnote

[7] **Evidence**
Party asserting or denying existence of facts

Where statutory text is silent on allocation of burden of persuasion, ordinary default rule is that plaintiffs bear risk of failing to prove their claims.

120 Cases that cite this headnote

****2344 *167 *Syllabus**

Petitioner Gross filed suit, alleging that respondent (FBL) demoted him in violation of the Age Discrimination in Employment Act of 1967 (ADEA), which makes it unlawful for an employer to take adverse action against an employee "because of such individual's age," 29 U.S.C. § 623(a). At the close of trial, and over FBL's objections, the District Court instructed the jury to enter a verdict for Gross if he proved, by a preponderance of the evidence, that he was demoted and his age was a motivating factor in the demotion decision, and told the jury that age was a motivating factor if it played a part in the demotion. It also instructed the jury to return a verdict for FBL if it ****2345** proved that it would have demoted Gross regardless of age. The jury returned a verdict for Gross. The Eighth Circuit reversed and remanded for a new trial, holding that the jury had been incorrectly instructed under the standard established in *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268, for cases under Title VII of the Civil Rights Act of 1964 when an employee alleges that he suffered an adverse employment action because of both permissible and impermissible considerations—*i.e.,* a "mixed-motives" case.

Held: A plaintiff bringing an ADEA disparate-treatment claim must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision. Pp. 2348 – 2352.

(a) Because Title VII is materially different with respect to the relevant burden of persuasion, this Court's interpretation of the ADEA is not governed by Title VII decisions such as *Price Waterhouse* and *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 94–95, 123 S.Ct. 2148, 156 L.Ed.2d 84. This Court has never applied Title VII's burden-shifting framework to ADEA claims and declines to do so now. When conducting statutory interpretation, the Court "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Federal Express Corp. v. Holowecki,* 552 U.S. 389, ——, 128 S.Ct. 1147, 1153, 170 L.Ed.2d 10. Unlike Title VII, which has been amended to explicitly authorize discrimination claims where an improper consideration was "a motivating factor" for the adverse ***168** action, see 42 U.S.C. §§ 2000e–2(m) and 2000e–5(g)(2)(B), the ADEA does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it added §§ 2000e–2(m) and 2000e–5(g) (2)(B) to Title VII, even though it contemporaneously amended the ADEA in several ways. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally, see *EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 256, 111 S.Ct. 1227, 113 L.Ed.2d 274, and "negative implications raised by disparate provisions are strongest" where the provisions were "considered simultaneously when the language raising the implication was inserted," *Lindh v. Murphy,* 521 U.S. 320, 330, 117

S.Ct. 2059, 138 L.Ed.2d 481. Pp. 2348 – 2349.

(b) The ADEA's text does not authorize an alleged mixed-motives age discrimination claim. The ordinary meaning of the ADEA's requirement that an employer took adverse action "because of" age is that age was the "reason" that the employer decided to act. See *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338. To establish a disparate-treatment claim under this plain language, a plaintiff must prove that age was the "but-for" cause of the employer's adverse decision. See *Bridge v. Phoenix Bond & Indemnity Co.,* 553 U.S. 639, ——, 128 S.Ct. 2131, 170 L.Ed.2d 1012. It follows that under § 623(a)(1), the plaintiff retains the burden of persuasion to establish that "but-for" cause. This Court has previously held this to be the burden's proper allocation in ADEA cases, see, *e.g., Kentucky Retirement Systems v. EEOC,* 554 U.S. 135, ——– – ——, ——– – ——–, 128 S.Ct. 2361, 171 L.Ed.2d 322, and nothing in the statute's text indicates that Congress has carved out an exception for a subset of ADEA cases. Where a statute is ****2346** "silent on the allocation of the burden of persuasion," "the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims." *Schaffer v. Weast,* 546 U.S. 49, 56, 126 S.Ct. 528, 163 L.Ed.2d 387. Hence, the burden of persuasion is the same in alleged mixed-motives cases as in any other ADEA disparate-treatment action. Pp. 2350 – 2351.

(c) This Court rejects petitioner's contention that the proper interpretation of the ADEA is nonetheless controlled by *Price Waterhouse,* which initially established that the burden of persuasion shifted in alleged mixed-motives Title VII claims. It is far from clear that the Court would have the same approach were it to consider the question today in the first instance. Whatever *Price Waterhouse* 's deficiencies in retrospect, it has become evident in the years since that case was decided that its burden-shifting framework is difficult to apply. The problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims. Cf. *Continental T. V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 47, 97 S.Ct. 2549, 53 L.Ed.2d 568. Pp. 2351 – 2352.

526 F.3d 356, vacated and remanded.

Thomas, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined.

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Opinion

Justice THOMAS delivered the opinion of the Court.

***169** The question presented by the petitioner in this case is whether a plaintiff must present direct evidence of age discrimination ***170** in order to obtain a mixed-motives jury instruction in a suit brought under the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.* Because we hold that such a jury instruction is never proper in an ADEA case, we vacate the decision below.

I

Petitioner Jack Gross began working for respondent FBL Financial Group, Inc. (FBL), in 1971. As of 2001, Gross held the position of claims administration director. But in 2003, when he was 54 years old, Gross was reassigned to the position of claims project coordinator. At that same time, FBL transferred many of Gross' job responsibilities to a newly created position—claims administration manager. That position was given to Lisa Kneeskern, ****2347** who had previously been supervised by Gross and who was then in her early forties. App. to Pet. for Cert. 23a (District Court opinion). Although Gross (in his new position) and Kneeskern received the same compensation, Gross considered the reassignment a demotion because of FBL's reallocation of his former job responsibilities to Kneeskern.

In April 2004, Gross filed suit in District Court, alleging that his reassignment to the position of claims project coordinator violated the ADEA, which makes it unlawful

for an employer to take adverse action against an employee "because of such individual's age." 29 U.S.C. § 623(a). The case proceeded to trial, where Gross introduced evidence suggesting that his reassignment was based at least in part on his age. FBL defended its decision on the grounds that Gross' reassignment was part of a corporate restructuring and that Gross' new position was better suited to his skills. See App. to Pet. for Cert. 23a (District Court opinion).

At the close of trial, and over FBL's objections, the District Court instructed the jury that it must return a verdict for Gross if he proved, by a preponderance of the evidence, that FBL "demoted [him] to claims projec[t] coordinator" and ***171** that his "age was a motivating factor" in FBL's decision to demote him. App. 9–10. The jury was further instructed that Gross' age would qualify as a " 'motivating factor,' if [it] played a part or a role in [FBL]'s decision to demote [him]." *Id.,* at 10. The jury was also instructed regarding FBL's burden of proof. According to the District Court, the "verdict must be for [FBL] ... if it has been proved by the preponderance of the evidence that [FBL] would have demoted [Gross] regardless of his age." *Ibid.* The jury returned a verdict for Gross, awarding him $46,945 in lost compensation. *Id.,* at 8.

FBL challenged the jury instructions on appeal. The United States Court of Appeals for the Eighth Circuit reversed and remanded for a new trial, holding that the jury had been incorrectly instructed under the standard established in *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). See 526 F.3d 356, 358 (2008). In *Price Waterhouse,* this Court addressed the proper allocation of the burden of persuasion in cases brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*, when an employee alleges that he suffered an adverse employment action because of both permissible and impermissible considerations—*i.e.,* a "mixed-motives" case. 490 U.S., at 232, 244–247, 109 S.Ct. 1775 (plurality opinion). The *Price Waterhouse* decision was splintered. Four Justices joined a plurality opinion, see *id.,* at 231–258, 109 S.Ct. 1775, Justices White and O'Connor separately concurred in the judgment, see *id.,* at 258–261, 109 S.Ct. 1775 (opinion of White, J.); *id.,* at 261–279, 109 S.Ct. 1775 (opinion of O'Connor, J.), and three Justices dissented, see *id.,* at 279–295, 109 S.Ct. 1775 (opinion of KENNEDY, J.). Six Justices ultimately agreed that if a Title VII plaintiff shows that discrimination was a "motivating" or a " 'substantial' " factor in the employer's action, the burden of persuasion should shift to the employer to show that it would have taken the same action regardless of that impermissible consideration. See *id.,* at 258, 109 S.Ct. 1775 (plurality opinion); *id.,* at 259–260, 109 S.Ct. 1775 (opinion of White, J.); *id.,* at 276, 109 S.Ct. 1775 (opinion ***172** of O'Connor, J.). Justice O'Connor further found that to shift the burden of persuasion to the employer, the employee must present "direct evidence that an illegitimate criterion was a substantial factor in the [employment] decision." *Id.,* at 276, 109 S.Ct. 1775.

****2348** In accordance with Circuit precedent, the Court of Appeals identified Justice O'Connor's opinion as controlling. See 526 F.3d, at 359 (citing *Erickson v. Farmland Industries, Inc.,* 271 F.3d 718, 724 (C.A.8 2001)). Applying that standard, the Court of Appeals found that Gross needed to present "[d]irect evidence ... sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." 526 F.3d, at 359 (internal quotation marks omitted). In the Court of Appeals' view, "direct evidence" is only that evidence that "show[s] a specific link between the alleged discriminatory animus and the challenged decision." *Ibid.* (internal quotation marks omitted). Only upon a presentation of such evidence, the Court of Appeals held, should the burden shift to the employer " 'to convince the trier of fact that it is more likely than not that the decision would have been the same absent consideration of the illegitimate factor.' " *Ibid.* (quoting *Price Waterhouse, supra,* at 276, 109 S.Ct. 1775 (opinion of O'Connor, J.)).

The Court of Appeals thus concluded that the District Court's jury instructions were flawed because they allowed the burden to shift to FBL upon a presentation of a preponderance of *any* category of evidence showing that age was a motivating factor—not just "direct evidence" related to FBL's alleged consideration of age. See 526 F.3d, at 360. Because Gross conceded that he had not presented direct evidence of discrimination, the Court of Appeals held that the District Court should not have given the mixed-motives instruction. *Ibid.* Rather, Gross should have been held to the burden of persuasion applicable to typical, non-mixed-motives claims; the jury thus should have been instructed ***173** only to determine whether Gross had carried his burden of "prov [ing] that age was the determining factor in FBL's employment action." See *ibid.*

We granted certiorari, 555 U.S. ——, 129 S.Ct. 680, 172 L.Ed.2d 649 (2008), and now vacate the decision of the Court of Appeals.

II

[1] The parties have asked us to decide whether a plaintiff must "present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case." Pet. for Cert. i. Before reaching this question, however, we must first determine whether the

burden of persuasion ever shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA.1 We hold that it does not.

A

Petitioner relies on this Court's decisions construing Title VII for his interpretation of the ADEA. Because Title VII is materially different with respect to the relevant burden of persuasion, however, these decisions do not control our construction of the ADEA.

****2349** In *Price Waterhouse,* a plurality of the Court and two Justices concurring in the judgment determined that once a "plaintiff in a Title VII case proves that [the plaintiff's membership in a protected class] played a motivating part in an ***174** employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken [that factor] into account." 490 U.S., at 258, 109 S.Ct. 1775; see also *id.,* at 259–260, 109 S.Ct. 1775 (opinion of White, J.); *id.,* at 276, 109 S.Ct. 1775 (opinion of O'Connor, J.). But as we explained in *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 94–95, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003), Congress has since amended Title VII by explicitly authorizing discrimination claims in which an improper consideration was "a motivating factor" for an adverse employment decision. See 42 U.S.C. § 2000e–2(m) (providing that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice" (emphasis added)); § 2000e–5(g)(2)(B) (restricting the remedies available to plaintiffs proving violations of § 2000e–2(m)).

[2] This Court has never held that this burden-shifting framework applies to ADEA claims. And, we decline to do so now. When conducting statutory interpretation, we "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Federal Express Corp. v. Holowecki,* 552 U.S. 389, ——, 128 S.Ct. 1147, 1153, 170 L.Ed.2d 10 (2008). Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII to add §§ 2000e–2(m) and 2000e–5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways, see Civil Rights Act of 1991, § 115, 105 Stat. 1079; *id.,* § 302, at 1088.

[3] **[4]** We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally. ***175** See *EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 256, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991). Furthermore, as the Court has explained, "negative implications raised by disparate provisions are strongest" when the provisions were "considered simultaneously when the language raising the implication was inserted." *Lindh v. Murphy,* 521 U.S. 320, 330, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). As a result, the Court's interpretation of the ADEA is not governed by Title VII decisions such as *Desert Palace* and *Price Waterhouse.*2

****2350 B**

[5] **[6]** Our inquiry therefore must focus on the text of the ADEA to decide whether it authorizes a mixed-motives age discrimination claim. It does not. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." ***176** *Engine Mfrs. Assn. v. South Coast Air Quality Management Dist.,* 541 U.S. 246, 252, 124 S.Ct. 1756, 158 L.Ed.2d 529 (2004) (internal quotation marks omitted). The ADEA provides, in relevant part, that "[i]t shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added).

The words "because of" mean "by reason of: on account of." 1 Webster's Third New International Dictionary 194 (1966); see also 1 Oxford English Dictionary 746 (1933) (defining "because of" to mean "By reason *of,* on account *of*" (italics in original)); The Random House Dictionary of the English Language 132 (1966) (defining "because" to mean "by reason; on account"). Thus, the ordinary meaning of the ADEA's requirement that an employer took adverse action "because of" age is that age was the "reason" that the employer decided to act. See *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (explaining that the claim "cannot succeed unless the employee's protected trait actually played a role in [the employer's decisionmaking] process *and had a determinative influence on the outcome* " (emphasis added)). To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the "but-for" cause of the employer's adverse decision. See *Bridge v. Phoenix Bond*

& Indemnity Co., 553 U.S. 639, ——, 128 S.Ct. 2131, 2141–2142, 170 L.Ed.2d 1012 (2008) (recognizing that the phrase, "by reason of," requires at least a showing of "but for" causation (internal quotation marks omitted)); *Safeco Ins. Co. of America v. Burr,* 551 U.S. 47, 63–64, and n. 14, 127 S.Ct. 2201, 167 L.Ed.2d 1045 (2007) (observing that "[i]n common talk, the phrase 'based on' indicates a but-for causal relationship and thus a necessary logical condition" and that the statutory phrase, "based on," has the same meaning as the phrase, "because of" (internal quotation marks omitted)); cf. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 265 (5th ed. 1984) ***177** ("An act or omission is not regarded as a cause of an event if the particular event would have occurred without it").3

****2351 [7]** It follows, then, that under § 623(a)(1), the plaintiff retains the burden of persuasion to establish that age was the "but-for" cause of the employer's adverse action. Indeed, we have previously held that the burden is allocated in this manner in ADEA cases. See *Kentucky Retirement Systems v. EEOC,* 554 U.S. 135, ——–——, ——– 128, 128 S.Ct. 2361, 2363–2366, 2369–2371, 171 L.Ed.2d 322 (2008); *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 141, 143, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). And nothing in the statute's text indicates that Congress has carved out an exception to that rule for a subset of ADEA cases. Where the statutory text is "silent on the allocation of the burden of persuasion," we "begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." *Schaffer v. Weast,* 546 U.S. 49, 56, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); see also *Meacham v. Knolls Atomic Power Laboratory,* 554 U.S. 84, ——, 128 S.Ct. 2395, 2400–2401, 171 L.Ed.2d 283 (2008) ("Absent some reason to believe that Congress intended otherwise, ... we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief" (internal quotation marks omitted)). We have no warrant to depart from the general rule in this setting.

Hence, the burden of persuasion necessary to establish employer liability is the same in alleged mixed-motives cases as in any other ADEA disparate-treatment action. A plaintiff must prove by a preponderance of the evidence (which may ***178** be direct or circumstantial), that age was the " but-for" cause of the challenged employer decision. See *Reeves, supra,* at 141–143, 147, 120 S.Ct. 2097.4

III

Finally, we reject petitioner's contention that our interpretation of the ADEA is controlled by *Price Waterhouse,* which initially established that the burden of persuasion shifted in alleged mixed-motives Title VII claims.5 In any event, it is far ****2352** from clear that the Court would have the same approach were it to consider the question today in the first ***179** instance. Cf. *14 Penn Plaza LLC v. Pyett,* 556 U.S. ——, ——, 129 S.Ct. 1456, 1472, 173 L.Ed.2d 398 (2009) (declining to "introduc[e] a qualification into the ADEA that is not found in its text"); *Meacham, supra,* at ——, 128 S.Ct., at 2406 (explaining that the ADEA must be "read ... the way Congress wrote it").

Whatever the deficiencies of *Price Waterhouse* in retrospect, it has become evident in the years since that case was decided that its burden-shifting framework is difficult to apply. For example, in cases tried to a jury, courts have found it particularly difficult to craft an instruction to explain its burden-shifting framework. See, *e.g., Tyler v. Bethlehem Steel Corp.,* 958 F.2d 1176, 1179 (C.A.2 1992) (referring to "the murky water of shifting burdens in discrimination cases"); *Visser v. Packer Engineering Associates, Inc.,* 924 F.2d 655, 661 (C.A.7 1991) (en banc) (Flaum, J., dissenting) ("The difficulty judges have in formulating [burden-shifting] instructions and jurors have in applying them can be seen in the fact that jury verdicts in ADEA cases are supplanted by judgments notwithstanding the verdict or reversed on appeal more frequently than jury verdicts generally"). Thus, even if *Price Waterhouse* was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims. Cf. *Continental T. V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 47, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977) (reevaluating precedent that was subject to criticism and "continuing controversy and confusion"); *Payne v. Tennessee,* 501 U.S. 808, 839–844, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (SOUTER, J., concurring).6

***180** IV

We hold that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision. Accordingly, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, dissenting.

The Age Discrimination in Employment Act of 1967 (ADEA), **2353 29 U.S.C. § 621 *et seq.*, makes it unlawful for an employer to discriminate against any employee "because of" that individual's age, § 623(a). The most natural reading of this statutory text prohibits adverse employment actions motivated in whole or in part by the age of the employee. The "but-for" causation standard endorsed by the Court today was advanced in Justice KENNEDY's dissenting opinion in *Price Waterhouse v. Hopkins,* 490 U.S. 228, 279, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), a case construing identical language in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1). Not only did the Court reject the but-for standard in that case, but so too did Congress when it amended Title VII in 1991. Given this unambiguous history, it is particularly inappropriate for the Court, on its own initiative, to adopt an interpretation of the ***181** causation requirement in the ADEA that differs from the established reading of Title VII. I disagree not only with the Court's interpretation of the statute, but also with its decision to engage in unnecessary lawmaking. I would simply answer the question presented by the certiorari petition and hold that a plaintiff need not present direct evidence of age discrimination to obtain a mixed-motives instruction.

I

The Court asks whether a mixed-motives instruction is ever appropriate in an ADEA case. As it acknowledges, this was not the question we granted certiorari to decide.[1] Instead, the question arose for the first time in respondent's brief, which asked us to "overrule *Price Waterhouse* with respect to its application to the ADEA." Brief for Respondent 26 (boldface type deleted). In the usual course, this Court would not entertain such a request raised only in a merits brief: " 'We would normally expect notice of an intent to make so far-reaching an argument in the respondent's opposition to a petition for certiorari, cf. this Court's Rule 15.2, thereby assuring adequate preparation time for those likely affected and wishing to participate.' " *Alabama v. Shelton,* 535 U.S. 654, 660, n. 3, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002) (quoting *South Central Bell Telephone Co. v. Alabama,* 526 U.S. 160, 171, 119 S.Ct. 1180, 143 L.Ed.2d 258 (1999)). Yet the Court is unconcerned that the question it chooses to answer has not been briefed by the parties or interested *amici curiae.* Its failure to consider the views of the United States, which represents the agency charged with administering the ADEA, is especially irresponsible.[2]

***182** Unfortunately, the majority's inattention to prudential Court practices is matched by its utter disregard of our precedent and Congress' intent. The ADEA provides that "[i]t shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added). As we recognized in *Price Waterhouse* when we construed the identical "because of" language of Title VII, see 42 U.S.C. § 2000e–2(a)(1) (making it unlawful for an employer "to fail or refuse to hire or to discharge any individual ... with respect to his compensation, terms, **2354 conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin" (emphasis added)), the most natural reading of the text proscribes adverse employment actions motivated in whole or in part by the age of the employee.

In *Price Waterhouse,* we concluded that the words " 'because of' such individual's ... sex ... mean that gender must be irrelevant to employment decisions." 490 U.S., at 240, 109 S.Ct. 1775 (plurality opinion); see also *id.,* at 260, 109 S.Ct. 1775 (White, J., concurring in judgment). To establish a violation of Title VII, we therefore held, a plaintiff had to prove that her sex was a motivating factor in an adverse employment decision.[3] We recognized that the employer had an affirmative defense: It could avoid a finding of liability by proving ***183** that it would have made the same decision even if it had not taken the plaintiff's sex into account. *Id.,* at 244–245, 109 S.Ct. 1775 (plurality opinion). But this affirmative defense did not alter the meaning of "because of." As we made clear, when "an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex." *Id.,* at 241, 109 S.Ct. 1775; see also *id.,* at 260, 109 S.Ct. 1775 (White, J., concurring in judgment). We readily rejected the dissent's contrary assertion. "To construe the words 'because of' as colloquial shorthand for 'but-for' causation," we said, "is to misunderstand them." *Id.,* at 240, 109 S.Ct. 1775 (plurality opinion).[4]

Today, however, the Court interprets the words "because of" in the ADEA "as colloquial shorthand for 'but-for' causation." *Ibid.* That the Court is construing the ADEA rather than Title VII does not justify this departure from precedent. The relevant language in the two statutes is identical, and we have long recognized that our interpretations of Title VII's language apply "with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.' " *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985) (quoting *Lorillard v. Pons,* 434 U.S. 575, 584, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978)). See generally

Northcross v. Board of Ed. of Memphis City Schools, 412 U.S. 427, 428, 93 S.Ct. 2201, 37 L.Ed.2d 48 (1973) *(per curiam)*. For this reason, Justice KENNEDY's dissent in *Price Waterhouse* assumed the plurality's mixed-motives framework extended to the ADEA, see 490 U.S., at 292, 109 S.Ct. 1775, and the Courts of Appeals ***184** to have ****2355** considered the issue unanimously have applied *Price Waterhouse*to ADEA claims.5

The Court nonetheless suggests that applying *Price Waterhouse* would be inconsistent with our ADEA precedents. In particular, the Court relies on our statement in *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993), that "[a disparate-treatment] claim 'cannot succeed unless the employee's protected trait actually played a role in [the employer's decisionmaking] process *and had a determinative influence on the outcome.*' " *Ante,* at 2350. The italicized phrase is at best inconclusive as to the meaning of the ADEA's "because of" language, however, as other passages in *Hazen Paper Co.* demonstrate. We also stated, for instance, that the ADEA "requires the employer to *ignore* an employee's age," *id.,* at 612, 113 S.Ct. 1701 (emphasis added), and noted that "[w]hen the employer's decision is *wholly motivated* by factors other than age," there is no violation, *id.*, at 611 (emphasis altered). So too, we indicated the "possibility of dual liability under ERISA and the ADEA where the decision to fire the employee was motivated both by the employee's age and by his pension status," *id.,* at 613, 113 S.Ct. 1701—a classic mixed-motives scenario.

Moreover, both *Hazen Paper Co.* and *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), on which the majority also relies, support the conclusion that the ADEA ***185** should be interpreted consistently with Title VII. In those non-mixed-motives ADEA cases, the Court followed the standards set forth in non-mixed-motives Title VII cases including *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). See, *e.g., Reeves,* 530 U.S., at 141–143, 120 S.Ct. 2097; *Hazen Paper Co.,* 507 U.S., at 610, 113 S.Ct. 1701. This by no means indicates, as the majority reasons, that *mixed-motives* ADEA cases should follow those standards. Rather, it underscores that ADEA standards are generally understood to conform to Title VII standards.

II

The conclusion that "because of" an individual's age means that age was a motivating factor in an employment decision is bolstered by Congress' reaction to *Price Waterhouse* in the 1991 Civil Rights Act. As part of its response to "a number of recent decisions by the United States Supreme Court that sharply cut back on the scope and effectiveness of [civil rights] laws," H.R.Rep. No. 102–40, pt. 2, p. 2 (1991), U.S.Code Cong. & Admin.News 1991, p. 694 (hereinafter H.R. Rep.), Congress eliminated the affirmative defense to liability that *Price Waterhouse* had furnished employers and provided instead that an employer's same-decision showing would limit only a plaintiff's remedies. See § 2000e–5(g)(2)(B). Importantly, however, Congress ratified *Price Waterhouse* 's interpretation of the plaintiff's burden of proof, rejecting the dissent's suggestion in that case that but-for causation was the proper standard. See ****2356** § 2000e–2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice").

Because the 1991 Act amended only Title VII and not the ADEA with respect to mixed-motives claims, the Court reasonably declines to apply the amended provisions to the ***186** ADEA.6 But it proceeds to ignore the conclusion compelled by this interpretation of the Act: *Price Waterhouse* 's construction of "because of" remains the governing law for ADEA claims.

Our recent decision in *Smith v. City of Jackson,* 544 U.S. 228, 240, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005), is precisely on point, as we considered in that case the effect of Congress' failure to amend the disparate-impact provisions of the ADEA when it amended the corresponding Title VII provisions in the 1991 Act. Noting that "the relevant 1991 amendments expanded the coverage of Title VII[but] did not amend the ADEA or speak to the subject of age discrimination," we held that "*Wards Cove* 's pre–1991 interpretation of Title VII's identical language remains applicable to the ADEA." 544 U.S., at 240, 125 S.Ct. 1536 (discussing *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989)); see also *Meacham v. Knolls Atomic Power Laboratory,* 554 U.S. 84, ——, 128 S.Ct. 2395, 2405–2406, 171 L.Ed.2d 283 (2008). If the *Wards Cove* disparate-impact framework that Congress flatly repudiated in the Title VII context continues to apply to ADEA claims, the mixed-motives framework that Congress substantially endorsed surely applies.

Curiously, the Court reaches the opposite conclusion, relying on Congress' partial ratification of *Price Waterhouse* to argue against that case's precedential value. It reasons that if the 1991 amendments do not apply to the

ADEA, *Price Waterhouse* likewise must not apply because Congress effectively codified *Price Waterhouse* 's holding in the amendments. *Ante,* at 2348 – 2349. This does not follow. To the contrary, the fact that Congress endorsed this Court's ***187** interpretation of the "because of" language in *Price Waterhouse* (even as it rejected the employer's affirmative defense to liability) provides all the more reason to adhere to that decision's motivating-factor test. Indeed, Congress emphasized in passing the 1991 Act that the motivating-factor test was consistent with its original intent in enacting Title VII. See, *e.g.,* H.R. Rep., pt. 2, at 17 ("When enacting the Civil Rights Act of 1964, Congress made clear that it intended to prohibit all invidious consideration of sex, race, color, religion, or national origin in employment decisions"); *id.,* at 2 (stating that the Act "reaffirm[ed] that any reliance on prejudice in making employment decisions is illegal"); see also H.R. Rep., pt. 1, at 45; S.Rep. No. 101–315, pp. 6, 22 (1990).

The 1991 amendments to Title VII also provide the answer to the majority's argument that the mixed-motives approach has proved unworkable. *Ante,* at 2351 – 2352. Because Congress has codified a mixed- ****2357** motives framework for Title VII cases—the vast majority of antidiscrimination lawsuits—the Court's concerns about that framework are of no moment. Were the Court truly worried about difficulties faced by trial courts and juries, moreover, it would not reach today's decision, which will further complicate every case in which a plaintiff raises both ADEA and Title VII claims.

The Court's resurrection of the but-for causation standard is unwarranted. *Price Waterhouse* repudiated that standard 20 years ago, and Congress' response to our decision further militates against the crabbed interpretation the Court adopts today. The answer to the question the Court has elected to take up—whether a mixed-motives jury instruction is ever proper in an ADEA case—is plainly yes.

III

Although the Court declines to address the question we granted certiorari to decide, I would answer that question by following our unanimous opinion in *Desert Palace, Inc. v.* ***188** *Costa,* 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003). I would accordingly hold that a plaintiff need not present direct evidence of age discrimination to obtain a mixed-motives instruction.

The source of the direct-evidence debate is Justice O'Connor's opinion concurring in the judgment in *Price Waterhouse.* Writing only for herself, Justice O'Connor argued that a plaintiff should be required to introduce "direct evidence" that her sex motivated the decision before the plurality's mixed-motives framework would apply. 490 U.S., at 276, 109 S.Ct. 1775.[7] Many courts have treated Justice O'Connor's opinion in *Price Waterhouse* as controlling for both Title VII and ADEA mixed-motives cases in light of our statement in *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' " Unlike the cases *Marks* addressed, however, *Price Waterhouse* garnered five votes for a single rationale: Justice White agreed with the plurality as to the motivating-factor test, see *supra,* at 2354, n. 3; he disagreed only as to the type of evidence an employer was required to submit to prove that the same result would have occurred absent the unlawful motivation. Taking the plurality to demand objective evidence, he wrote separately to express his view that an employer's credible testimony could suffice. 490 U.S., at 261, 109 S.Ct. 1775. Because Justice White provided a fifth vote for the "rationale explaining the result" of the *Price Waterhouse* decision, *Marks,* 430 U.S., at 193, 97 S.Ct. 990, his concurrence is properly understood as controlling, and he, ***189** like the plurality, did not require the introduction of direct evidence.

Any questions raised by *Price Waterhouse* as to a direct evidence requirement were settled by this Court's unanimous decision in *Desert Palace,* in which we held that a plaintiff need not introduce direct evidence to meet her burden in a mixed-motives case under Title VII, as amended by the Civil Rights Act of 1991. In construing ****2358** the language of § 2000e–2(m), we reasoned that the statute did not mention, much less require, a heightened showing through direct evidence and that "Congress has been unequivocal when imposing heightened proof requirements." 539 U.S., at 99, 123 S.Ct. 2148. The statute's silence with respect to direct evidence, we held, meant that "we should not depart from the '[c]onventional rul[e] of civil litigation ... [that] requires a plaintiff to prove his case by a preponderance of the evidence', ... using 'direct or circumstantial evidence.' " *Ibid.* (quoting *Price Waterhouse,* 490 U.S., at 253, 109 S.Ct. 1775 (plurality opinion), and *Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983)). We also recognized the Court's consistent acknowledgment of the utility of circumstantial evidence in discrimination cases.

Our analysis in *Desert Palace* applies with equal force to the ADEA. Cf. *ante,* at 2351 – 2352, n. 4. As with the 1991 amendments to Title VII, no language in the ADEA imposes a heightened direct evidence requirement, and we

have specifically recognized the utility of circumstantial evidence in ADEA cases. See *Reeves,* 530 U.S., at 147, 120 S.Ct. 2097 (cited by *Desert Palace,* 539 U.S., at 99–100, 123 S.Ct. 2148). Moreover, in *Hazen Paper Co.,* we held that an award of liquidated damages for a "willful" violation of the ADEA did not require proof of the employer's motivation through direct evidence, 507 U.S., at 615, 113 S.Ct. 1701, and we have similarly rejected the imposition of special evidentiary rules in other ADEA cases. See, *e.g., Swierkiewicz v. Sorema N. A.,* 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *O'Connor v. Consolidated Coin Caterers Corp.,* 517 U.S. 308, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996). *Desert Palace* thus confirms the answer provided by the plurality ***190** and Justice White in *Price Waterhouse:* An ADEA plaintiff need not present direct evidence of discrimination to obtain a mixed-motives instruction.

IV

The Court's endorsement of a different construction of the same critical language in the ADEA and Title VII is both unwise and inconsistent with settled law. The but-for standard the Court adopts was rejected by this Court in *Price Waterhouse* and by Congress in the Civil Rights Act of 1991. Yet today the Court resurrects the standard in an unabashed display of judicial lawmaking. I respectfully dissent.

Justice BREYER, with whom Justice SOUTER and Justice GINSBURG join, dissenting.

I agree with Justice STEVENS that mixed-motive instructions are appropriate in the Age Discrimination in Employment Act context. And I join his opinion. The Court rejects this conclusion on the ground that the words "because of" require a plaintiff to prove that age was the "but-for" cause of his employer's adverse employment action. *Ante,* at 2350. But the majority does not explain why this is so. The words "because of" do not inherently require a showing of "but-for" causation, and I see no reason to read them to require such a showing.

It is one thing to require a typical tort plaintiff to show "but-for" causation. In that context, reasonably objective scientific or commonsense theories of physical causation make the concept of "but-for" causation comparatively easy to understand and relatively easy to apply. But it is an entirely different matter to determine a "but-for" relation when we consider, not physical forces, but the mind-related characterizations that constitute motive. Sometimes we speak of *determining* or *discovering* motives, but more often we ****2359** *ascribe* motives, after an event, to an individual in light ***191** of the individual's thoughts and other circumstances present at the time of decision. In a case where we characterize an employer's actions as having been taken out of multiple motives, say, both because the employee was old and because he wore loud clothing, to apply "but-for" causation is to engage in a hypothetical inquiry about what would have happened if the employer's thoughts and other circumstances had been different. The answer to this hypothetical inquiry will often be far from obvious, and, since the employee likely knows less than does the employer about what the employer was thinking at the time, the employer will often be in a stronger position than the employee to provide the answer.

All that a plaintiff can know for certain in such a context is that the forbidden motive did play a role in the employer's decision. And the fact that a jury has found that age did play a role in the decision justifies the use of the word "because," *i.e.*, the employer dismissed the employee because of his age (and other things). See *Price Waterhouse v. Hopkins,* 490 U.S. 228, 239–242, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion). I therefore would see nothing wrong in concluding that the plaintiff has established a violation of the statute.

But the law need not automatically assess liability in these circumstances. In *Price Waterhouse,* the plurality recognized an affirmative defense where the defendant could show that the employee would have been dismissed regardless. The law permits the employer this defense, not because the forbidden motive, age, had no role in the *actual* decision, but because the employer can show that he would have dismissed the employee anyway in the *hypothetical* circumstance in which his age-related motive was absent. And it makes sense that this would be an affirmative defense, rather than part of the showing of a violation, precisely because the defendant is in a better position than the plaintiff to establish how he would have acted in this hypothetical situation. See *id.,* at 242, 109 S.Ct. 1775; cf. *ante,* at 2356 (STEVENS, J., dissenting) (describing ***192** the Title VII framework). I can see nothing unfair or impractical about allocating the burdens of proof in this way.

The instruction that the District Court gave seems appropriate and lawful. It says, in pertinent part:

> "Your verdict must be for plaintiff if all the following elements have been proved by the preponderance of the evidence:
>
> .....

"[The] plaintiff's age was a motivating factor in defendant's decision to demote plaintiff.

"However, your verdict must be for defendant ... if it has been proved by the preponderance of the evidence that defendant would have demoted plaintiff regardless of his age.

.....

"As used in these instructions, plaintiff's age was 'a motivating factor,' if plaintiff's age played a part or a role in the defendant's decision to demote plaintiff. However, plaintiff's age need not have been the only reason for defendant's decision to demote plaintiff." App. 9–10.

For these reasons as well as for those set forth by Justice STEVENS, I respectfully dissent.

Parallel Citations

129 S.Ct. 2343, 106 Fair Empl.Prac.Cas. (BNA) 833, 92 Empl. Prac. Dec. P 43,584, 174 L.Ed.2d 119, 77 BNA USLW 4531, 09 Cal. Daily Op. Serv. 7539, 2009 Daily Journal D.A.R. 8888, 21 Fla. L. Weekly Fed. S 958

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Although the parties did not specifically frame the question to include this threshold inquiry, "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." This Court's Rule 14.1; see also *City of Sherrill v. Oneida Indian Nation of N. Y.*, 544 U.S. 197, 214, n. 8, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005) (" 'Questions not explicitly mentioned but essential to the analysis of the decisions below or to the correct disposition of the other issues have been treated as subsidiary issues fairly comprised by the question presented' " (quoting R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 414 (8th ed.2002))); *Ballard v. Commissioner*, 544 U.S. 40, 46–47, and n. 2, 125 S.Ct. 1270, 161 L.Ed.2d 227 (2005) (evaluating "a question anterior" to the "questions the parties raised").

2 Justice STEVENS argues that the Court must incorporate its past interpretations of Title VII into the ADEA because "the substantive provisions of the ADEA were derived *in haec verba* from Title VII," *post*, at 2354 (dissenting opinion) (internal quotation marks omitted), and because the Court has frequently applied its interpretations of Title VII to the ADEA, see *post*, at 2354 – 2356. But the Court's approach to interpreting the ADEA in light of Title VII has not been uniform. In *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 124 S.Ct. 1236, 157 L.Ed.2d 1094 (2004), for example, the Court declined to interpret the phrase "because of ... age" in 29 U.S.C. § 623(a) to bar discrimination against people of all ages, even though the Court had previously interpreted "because of ... race [or] sex" in Title VII to bar discrimination against people of all races and both sexes, see 540 U.S., at 584, 592, n. 5, 124 S.Ct. 1236. And the Court has not definitively decided whether the evidentiary framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), utilized in Title VII cases is appropriate in the ADEA context. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996). In this instance, it is the textual differences between Title VII and the ADEA that prevent us from applying *Price Waterhouse* and *Desert Palace* to federal age discrimination claims.

3 Justice BREYER contends that there is "nothing unfair or impractical" about hinging liability on whether "forbidden motive ... play [ed] a role in the employer's decision." *Post*, at 2359 (dissenting opinion). But that is a decision for Congress to make. See *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, ——, 128 S.Ct. 2326, 2338–2339, 171 L.Ed.2d 203 (2008). Congress amended Title VII to allow for employer liability when discrimination "was *a motivating factor* for any employment practice, even though other factors also motivated the practice," 42 U.S.C. § 2000e–2(m) (emphasis added), but did not similarly amend the ADEA, see *supra*, at 2348 – 2349. We must give effect to Congress' choice. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. ——, ——, 129 S.Ct. 1456, 1472, 173 L.Ed.2d 398 (2009).

4 Because we hold that ADEA plaintiffs retain the burden of persuasion to prove all disparate-treatment claims, we do not need to address whether plaintiffs must present direct, rather than circumstantial, evidence to obtain a burden-shifting instruction. There is no heightened evidentiary requirement for ADEA plaintiffs to satisfy their burden of persuasion that age was the "but-for" cause of their employer's adverse action, see 29 U.S.C. § 623(a), and we will imply none. "Congress has been unequivocal when imposing heightened proof requirements" in other statutory contexts, including in other subsections within Title 29, when it has seen fit. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003); see also, *e.g.*, 25 U.S.C. § 2504(b)(2)(B) (imposing "clear and convincing evidence" standard); 29 U.S.C. § 722(a)(2)(A) (same).

5 Justice STEVENS also contends that we must apply *Price Waterhouse* under the reasoning of *Smith v. City of Jackson*, 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005). See *post*, at 2356. In *Smith*, the Court applied to the ADEA its pre–1991 interpretation of Title VII with respect to disparate-impact claims despite Congress' 1991 amendment adding disparate-impact claims to Title VII but

not the ADEA. 544 U.S., at 240, 125 S.Ct. 1536. But the amendments made by Congress in this same legislation, which added the "motivating factor" language to Title VII, undermine Justice STEVENS' argument. Congress not only explicitly added "motivating factor" liability to Title VII, see *supra,* at 2348 – 2349, but it also partially abrogated *Price Waterhouse* 's holding by eliminating an employer's complete affirmative defense to "motivating factor" claims, see 42 U.S.C. § 2000e–5(g)(2)(B). If such "motivating factor" claims were already part of Title VII, the addition of § 2000e–5(g)(2)(B) alone would have been sufficient. Congress' careful tailoring of the "motivating factor" claim in Title VII, as well as the absence of a provision parallel to § 2000e–2(m) in the ADEA, confirms that we cannot transfer the *Price Waterhouse* burden-shifting framework into the ADEA.

6 Gross points out that the Court has also applied a burden-shifting framework to certain claims brought in contexts other than pursuant to Title VII. See Brief for Petitioner 54–55 (citing, *inter alia, NLRB v. Transportation Management Corp.,* 462 U.S. 393, 401–403, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983) (claims brought under the National Labor Relations Act (NLRA)); *Mt. Healthy City Bd. of Ed. v. Doyle,* 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977) (constitutional claims)). These cases, however, do not require the Court to adopt his contra statutory position. The case involving the NLRA did not require the Court to decide in the first instance whether burden shifting should apply as the Court instead deferred to the National Labor Relation Board's determination that such a framework was appropriate. See *NLRB, supra,* at 400–403, 103 S.Ct. 2469. And the constitutional cases such as *Mt. Healthy* have no bearing on the correct interpretation of ADEA claims, which are governed by statutory text.

1 "The question presented by the petitioner in this case is whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit brought under the [ADEA]." *Ante,* at 2346.

2 The United States filed an *amicus curiae* brief supporting petitioner on the question presented. At oral argument, the Government urged that the Court should not reach the issue it takes up today. See Tr. of Oral Arg. 20–21, 28–29.

3 Although Justice White stated that the plaintiff had to show that her sex was a "substantial" factor, while the plurality used the term "motivating" factor, these standards are interchangeable, as evidenced by Justice White's quotation of *Mt. Healthy City Bd. of Ed. v. Doyle,* 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977): " '[T]he burden was properly placed upon [the plaintiff to show that the illegitimate criterion] was a "substantial factor"—or, *to put it in other words,* that it was a "motivating factor" ' " in the adverse decision. *Price Waterhouse,* 490 U.S., at 259, 109 S.Ct. 1775 (emphasis added); see also *id.,* at 249, 109 S.Ct. 1775 (plurality opinion) (using "substantial" and "motivating" interchangeably).

4 We were no doubt aware that dictionaries define "because of" as "by reason of" or "on account of." *Ante,* at 2350. Contrary to the majority's bald assertion, however, this does not establish that the term denotes but-for causation. The dictionaries the Court cites do not, for instance, define "because of" as "*solely* by reason of" or "*exclusively* on account of." In *Price Waterhouse,* we recognized that the words "because of" do not mean "*solely* because of," and we held that the inquiry "commanded by the words" of the statute was whether gender was a motivating factor in the employment decision. 490 U.S., at 241, 109 S.Ct. 1775 (plurality opinion).

5 See *Febres v. Challenger Caribbean Corp.,* 214 F.3d 57 (C.A.1 2000); *Ostrowski v. Atlantic Mut. Ins. Cos.,* 968 F.2d 171 (C.A.2 1992); *Starceski v. Westinghouse Elec. Corp.,* 54 F.3d 1089 (C.A.3 1995); *EEOC v. Warfield–Rohr Casket Co.,* 364 F.3d 160 (C.A.4 2004); *Rachid v. Jack In The Box, Inc.,* 376 F.3d 305 (C.A.5 2004); *Wexler v. White's Fine Furniture, Inc.,* 317 F.3d 564 (C.A.6 2003); *Visser v. Packer Eng. Assocs., Inc.,* 924 F.2d 655 (C.A.7 1991) (en banc); *Hutson v. McDonnell Douglas Corp.,* 63 F.3d 771 (C.A.8 1995); *Lewis v. YMCA,* 208 F.3d 1303 (C.A.11 2000) *(per curiam);* see also *Gonzagowski v. Widnall,* 115 F.3d 744, 749 (C.A.10 1997).

6 There is, however, some evidence that Congress intended the 1991 mixed-motives amendments to apply to the ADEA as well. See H.R. Rep., pt. 2, at 4 (noting that a "number of other laws banning discrimination, including ... the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et seq., are modeled after and have been interpreted in a manner consistent with Title VII," and that "these other laws modeled after Title VII [should] be interpreted consistently in a manner consistent with Title VII as amended by this Act," including the mixed-motives provisions).

7 While Justice O'Connor did not define precisely what she meant by "direct evidence," we contrasted such evidence with circumstantial evidence in *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003). That Justice O'Connor might have intended a different definition does not affect my conclusion, as I do not believe a plaintiff is required to introduce any special type of evidence to obtain a mixed-motives instruction.

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137 Idaho 618
Court of Appeals of Idaho.

Alan HAGY, Plaintiff–Appellant,
v.
STATE of Idaho, Bannock County, City of Pocatello, Idaho, Defendants–Respondents.

No. 27015. \| May 8, 2002. \| Review Denied Aug. 1, 2002.

Brother of mentally ill victim brought negligent investigation action against city and county, alleging that they failed to properly investigate circumstances surrounding victim's death, and brought a wrongful death action against state, asserting that it breached its duty to involuntarily commit victim to mental health institution. The Sixth Judicial District Court, Bannock County, Peter D. McDermott, J., granted defendants' motions to dismiss and requests for Rule 11 sanctions, and brother appealed. The Court of Appeals, Perry, C.J., held that: (1) negligent investigation was not recognizable cause of action; (2) county coroner did not owe duty to order autopsy; (3) brother did not have standing to bring wrongful death action against state; (4) brother's letter to state requesting investigation into victim's death was insufficient to put state on notice that he was filing wrongful death action; and (5) imposition of Rule 11 sanctions was warranted for claims against city and county only.

Affirmed in part; vacated in part; remanded.

West Headnotes (15)

[1] **Counties**
Acts of officers or agents
Municipal Corporations
Health and education

Brother's claim against city and county for negligent investigation of mentally ill sister's death was not cause of action recognizable under Idaho law. I.C. § 6–901 et seq.

[2] **Municipal Corporations**
Nature and grounds of liability

Idaho Tort Claims Act (ITCA) subjects government entities to liability for negligent or wrongful acts committed by the entity or its employees where a private person would also be liable. I.C. § 6–901 et seq.

[3] **Coroners**
Autopsy

County coroner did not have actionable duty to perform autopsy after victim's body was discovered in river; rather, coroner had statutory discretion to order medical doctor to perform an autopsy and give opinion as to cause of death. I.C. § 19–4301B.

[4] **Statutes**
General and special statutes

A basic tenet of statutory construction is that the more specific statute or section addressing the issue controls over the statute that is more general.

[5] **Death**
Death of plaintiff or beneficiary

Brother did not have standing to bring wrongful death action against state, based on its alleged failure to involuntarily commit sister to mental health facility prior to her death; action, which was brought by brother as personal representative of mother's estate, abated when mother died prior to bringing claim. I.C. § 5–311.

1 Cases that cite this headnote

[6] **Death**
Heirs and next of kin

If there are no heirs, no right of action for wrongful death vests in anybody.

1 Cases that cite this headnote

[7] **Appeal and Error**
Scope and theory of case

An appellate court may affirm a lower court's decision on a legal theory different from the one applied by that court.

1 Cases that cite this headnote

[8] **States**
Form and sufficiency

Brother's letter to state requesting investigation into mentally ill sister's death, stating that circumstances surrounding sister's death and individuals responsible for death were unknown, was insufficient to put state on notice that brother was filing wrongful death claim as personal representative of mother's estate, where brother made only one reference to mother, near bottom of notice, that mother's heart attack, which caused her death, was result of trauma from sister's death.

2 Cases that cite this headnote

[9] **Appeal and Error**
Costs and Allowances

In determining whether a district court's imposition of Rule 11 sanctions is proper, an appellate court shall determine: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. Rules Civ.Proc., Rule 11.

[10] **Attorney and Client**
Liability for costs; sanctions

Rule 11 sanctions against attorney of brother for filing action against city and county alleging negligent investigation into sister's death after her body was found in river, where attorney failed to provide evidentiary support for allegations in complaint, failed to produce reports of private investigator hired by brother and could not recall investigator's name, failed to request copy of police report concerning its own investigation of sister's death, and failed to make reasonable inquiry as to law involved, but instead filed suit based on claim that was not recognizable under state law. Rules Civ.Proc., Rule 11(a)(1).

[11] **Costs**
Nature and Grounds of Right

Pleadings, motions, and other papers signed by an attorney must meet certain criteria, and failure to meet such criteria will result in the imposition of sanctions. Rules Civ.Proc., Rule 11(a)(1).

[12] **Attorney and Client**
Liability for costs; sanctions

In evaluating an attorney's conduct in filing a pleading for the purposes of determining whether an imposition of Rule 11 sanctions is justified, the district court must determine whether the attorney exercised reasonableness under the

circumstances and made a proper investigation upon reasonable inquiry into the facts and legal theories before signing and filing the document. Rules Civ.Proc., Rule 11(a)(1).

[13] **Attorney and Client**
Liability for costs; sanctions

Rule 11 sanctions were not warranted against attorney of brother who filed wrongful death action against state based on brother's status as personal representative of mother's estate, even though brother had no standing to bring claim and he failed to provide adequate notice to state that he was filing wrongful death action in addition to claims against city and county; brother could have raised legitimate arguments as to legal issues of standing and adequate notice. Rules Civ.Proc., Rule 11(a)(1).

[14] **Costs**
Nature and form of judgment, action, or proceedings for review

Brother's appeal from dismissal of claims against city and county for negligent investigation into mentally ill sister's death was pursued frivolously, unreasonably, and without legal or factual foundation, and thus, city and county were entitled to award of attorney fees incurred on appeal, where brother urged appellate court to grant relief for cause of action that did not exist. I.C. § 12–121; Appellate Rule 41.

[15] **Costs**
Right and Grounds

An award of attorney fees may be granted to the prevailing party on appeal, if appellate court is left with abiding belief that appeal was brought, or defended, frivolously, unreasonably, or without foundation, but attorney fees will not be awarded where the losing party brought the appeal in good faith and where a genuine issue of law was presented. I.C. § 12–121; Appellate Rule 41.

Attorneys and Law Firms

****434 *620** Richard D. Vance, Pocatello, for appellant.

Hon. Alan G. Lance, Attorney General; Jack H. Robison, Special Deputy Attorney General, Pocatello for respondent, State of Idaho. Jack H. Robison, argued.

Holden, Kidwell, Hahn & Crapo, Idaho Falls, for respondents, Bannock County and City of Pocatello. Donald L. Harris argued.

Opinion

PERRY, Chief Judge.

Alan Hagy appeals from the district court's orders dismissing his complaint against defendants State of Idaho, Bannock County, and the City of Pocatello. Hagy's counsel, Richard D. Vance, challenges the district court's order imposing sanctions against Vance, individually, pursuant to I.R.C.P. 11. We affirm in part, vacate in part, and remand.

I.

FACTUAL AND PROCEDURAL HISTORY

On June 5, 1998, the body of Hagy's sister, Karen, was found in the Portneuf River in Pocatello. Approximately three weeks later, Hagy's mother, Delores, suffered a heart attack and died. On October 13, Hagy mailed a letter to the Secretary of State's office, requesting that all agencies undertake appropriate inquiry in order to determine who was responsible for Karen's death. On April 17, 2000, Hagy filed a complaint against the state, county, and city. Specifically, Hagy alleged that the city police and county sheriff negligently investigated Karen's death and that the

county coroner was negligent in failing to conduct an autopsy on Karen's body. With regard to the state, Hagy contended that the state breached its duty to involuntarily commit Karen to a mental health facility.

Hagy also purported to bring a civil action of homicide alleging that, approximately five months prior to Karen's death, she purchased a life insurance policy and that it was unknown to Hagy where Karen was able to acquire the money to purchase the policy. Hagy further alleged that, because two of the beneficiaries of the life insurance policy were two of Karen's mental health care providers, those two mental health care providers directly or indirectly intentionally caused Karen's death. However, Hagy did not allege which of the three defendants these two mental health care providers were employed by. Hagy's complaint alleged that as a result, the state was responsible for the deaths of Karen and his mother. Hagy sought compensation for the "suffering and emotional ****435 *621** distress that he has suffered and will suffer for the death of his sister and mother" and compensation for the "emotional distress that he has incurred because of his inability to know the cause of his sister's death."

The state, county and city each filed a motion to dismiss Hagy's complaint for failure to state a claim upon which relief could be granted and requested Rule 11 sanctions. After a hearing, the district court dismissed Hagy's complaint against the county and city, concluding that Idaho does not recognize a cause of action for negligent investigation. The district court took the remainder of the motions under advisement pending the filing of an amended complaint by Hagy.

Hagy filed a motion to reconsider the order dismissing the complaint against the county and city and a motion to amend his complaint. The district court denied Hagy's motion to reconsider and his motion to file an amended complaint and dismissed Hagy's complaint against the state with prejudice. Additionally, the district court ordered Vance to pay Rule 11 sanctions of $3,000. Hagy appeals.

II.

STANDARD OF REVIEW

In reviewing a trial court's order granting a motion to dismiss, our standard of review is the same as our summary judgment standard. *Rim View Trout Co. v. Idaho Dep't of Water Res.,* 119 Idaho 676, 677, 809 P.2d 1155, 1156 (1991). We first note that summary judgment under I.R.C.P. 56(c) is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. On appeal, we exercise free review in determining whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Edwards v. Conchemco, Inc.,* 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct.App.1986). When assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. Furthermore, the trial court must draw all reasonable inferences in favor of the party resisting the motion. *G & M Farms v. Funk Irrigation Co.,* 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Sanders v. Kuna Joint School Dist.,* 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994).

III.

ANALYSIS

A. Claim Against the City

[1] [2] Hagy contends that the district court erred in dismissing his complaint against the city, asserting that the cause of action alleged is a valid claim pursuant to I.C. § 6–903. The Idaho Tort Claims Act (ITCA), I.C. §§ 6–901 to –929, subjects government entities to liability for negligent or wrongful acts committed by the entity or its employees where a private person would also be liable. *Limbert v. Twin Falls County,* 131 Idaho 344, 346, 955 P.2d 1123, 1125 (Ct.App.1998), *Herrera v. Conner,* 111 Idaho 1012, 1021, 729 P.2d 1075, 1084 (Ct.App.1987). When a trial court is considering a motion for dismissal of a complaint against a governmental entity and its employees under the ITCA, the Idaho Supreme Court has stated that:

> [A] trial judge should first determine whether the plaintiffs' allegations and supporting record generally state a cause of action for which "a private person or entity would be liable for money damages under the laws of the state of Idaho." *Walker v. Shoshone County,* 112 Idaho 991, 995, 739 P.2d 290, 294 (1987).... In consideration of the initial inquiry as to whether a private individual or entity could be held liable under the facts alleged in the complaint, we essentially ask "is there such a tort under the laws of Idaho?" *Id.*

Czaplicki v. Gooding Joint Sch. Dist. No. 231, 116 Idaho 326, 330, 775 P.2d 640, 644 (1989).

In this case, the district court concluded that under *Wimer v. State,* 122 Idaho 923, 841 P.2d 453 (Ct.App.1992), Idaho does not recognize a cause of action for negligent investigation. In *Wimer,* the appellants brought a claim against the state under the ITCA contending that two

Department of Fish and Game officers had negligently conducted ****436 *622** their investigation into the appellant's alleged poaching of elk. This Court stated:

> Our own research has uncovered no states that have held that a cause of action for negligent investigation exists. Therefore, we accept the statement in *Dirienzo v. United States,* 690 F.Supp. 1149 (D.Conn.1988), that the common law did not impose liability upon even a private person for mere negligence in instituting or continuing a criminal prosecution for a crime which has actually occurred.

Id. at 925, 841 P.2d at 455. Because Idaho does not recognize a cause of action for negligent investigation, the district court did not err in dismissing Hagy's complaint against the city.

B. Claim Against the County

With regard to the county, Hagy first argues that the district court abused its discretion when it determined that negligent investigation is not a cause of action recognized in this state. Based on our analysis of this issue with regard to the city, we conclude that the district court did not abuse its discretion with regard to this issue as it also applies to the county sheriff.

[3] Hagy further argues that the district court erred when it dismissed his claim that the county is liable due to the county coroner's failure to perform an autopsy. Hagy contends that I.C. § 19–4301(b) imposes a duty on a county coroner to investigate a death that occurs under unknown or suspicious circumstances and that the coroner in this case breached that duty by not performing an autopsy on Karen.

Idaho Code Section 19–4301(b) requires that, when a coroner is informed that a person in the county has died under unknown circumstances, the coroner must refer the investigation to either the county sheriff or chief of police. There is no dispute between the parties in this case that an investigation was conducted.

[4] However, Idaho Code Section 19–4301B provides that a coroner *may* request a medical doctor to perform an autopsy and give a professional opinion as to the cause of death. As this section deals directly with the issue of when an autopsy may be ordered, it is the more specific statute in this case. A basic tenet of statutory construction is that the more specific statute or section addressing the issue controls over the statute that is more general. *See Mulder v. Liberty Northwest Ins. Co.,* 135 Idaho 52, 58, 14 P.3d 372, 378 (2000). Therefore, I.C. § 19–4301B controls in this case and dictates that the performance of an autopsy is not mandatory, but rather falls within the discretion of the coroner. We conclude that based on the language of this statute, the district court did not err when it determined that the coroner did not owe a duty to perform an autopsy on Karen and properly dismissed Hagy's complaint against the county.

C. Claims Against the State

[5] Hagy next argues that the district court erred when it dismissed his complaint against the state. The district court dismissed the complaint on the basis that Hagy's letter sent to the state was insufficient to constitute an effective notice of tort claim under the ITCA. The state responds on appeal that Hagy did not have standing to sue and that he failed to provide proper notice of his claims under the ITCA.

Hagy's claims were wrongful death actions brought pursuant to I.C. § 5–311. That section defines who may pursue a wrongful death action and states, in pertinent part:

> (1) When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death ...
>
> (2) For the purposes of subsection (1) of this section, "heirs" mean:
>
> (a) Those persons who would be entitled to succeed to the property of the decedent according to the provisions of subsection (21) of section 15–1–201, Idaho Code.
>
> (b) Whether or not qualified under subsection (2)(a) of this section, the decedent's spouse, children, stepchildren, parents, and, when partly or wholly dependent on the decedent for support or services, any ****437 *623** blood relatives and adoptive brothers and sisters.

With regard to the claim for Karen's death, Hagy is not an heir entitled to maintain an action under I.C. § 5–311. Hagy contends that his mother was an heir of Karen under the terms of the statute and that her right to maintain a wrongful death action passed to her estate when she died. Hagy argues that he, as personal representative of his mother's estate, is thus entitled to bring a claim for Karen's death on behalf of his mother's estate. However, we construe I.C. § 5–311(1) to use "personal representative" to mean the personal representative of the *decedent,* not of the *heirs.* Thus, an action may be maintained for wrongful

death of a person by the decedent's heirs or the decedent's personal representative on behalf of the heirs.

[6] A number of courts in other states have held that where no wrongful death action is commenced during the life of the beneficiary, the action is abated upon the death of the beneficiary. *See Re Estate of Dillman,* 8 Ill.App.2d 239, 131 N.E.2d 634 (1956); *Pedroli v. Missouri P. Railroad,* 524 S.W.2d 882 (Mo.Ct.App.1975); *Simons v. Kidd,* 73 S.D. 280, 41 N.W.2d 840 (1950); *Carter v. Van Meter,* 495 S.W.2d 583 (Tex.Civ.App.1973); *Murray v. Dewar,* 6 Wis.2d 411, 94 N.W.2d 635 (1959). Furthermore, the Idaho Supreme Court has held that no right of action is given to the estate of the victim of a tort, but is granted only to his or her heirs. *See Moon v. Bullock,* 65 Idaho 594, 605, 151 P.2d 765, 770 (1944), *overruled on other grounds by Doggett v. Boiler Eng'g & Supply Co., Inc.,* 93 Idaho 888, 477 P.2d 511 (1970). If there are no heirs, no right of action vests in anybody. *Id.*

[7] Upon our review of the law, we conclude that the wrongful death action for Karen's death abated with the death of Hagy's mother. For this reason, Hagy did not have standing to pursue a claim against the state for Karen's death. Although argued by the parties below, the district court did not dismiss Hagy's complaint on that precise reasoning. However, an appellate court may affirm a lower court's decision on a legal theory different from the one applied by that court. *Matter of Estate of Bagley,* 117 Idaho 1091, 1093, 793 P.2d 1263, 1265 (Ct.App.1990). Thus, we conclude that the district court did not err in dismissing Hagy's complaint against the state for Karen's death.

[8] With regard to Hagy's claim against the state for his mother's death, Hagy is an heir under the terms of I.C. § 5–311 and had standing to bring such a claim. However, the record lacks evidence that Hagy sent the state a sufficient notice of tort claim as required by the ITCA. Hagy asserts that the notice sent regarding his sister's death was detailed enough to put the state on notice regarding his claim for his mother's death. The notice, in the form of a letter from Hagy's attorney, stated, "I have been retained by Alan Hagy to represent him with regard to the wrongful death of his sister Kathy [*sic*] Hagy." The remaining portions of the notice deal exclusively with the circumstances of Karen's death and only request that the state, county and city conduct an investigation into the circumstances of Karen's death. The notice further stated:

> The events prior to and subsequent to Karen's death are questionable, unknown and potentially criminal. The individuals responsible for her death, at this point, are unknown.
>
> As Mr. Hagy's attorney, I would respectfully request that all agencies induce appropriate inquiry in order to determine who is responsible for Karen's death.

The only mention of Hagy's mother in the notice occurs near the end and consists of one reference: "After Karen's death, her mother suffered a heart attack and died because of Karen's death. The events and circumstances subsequent to Karen's death are unfortunate and are also a result of these defendant's responsibility." We conclude that this passing reference to Hagy's mother was insufficient to put the state on notice that Hagy was also filing a claim for the death of his mother. Therefore, we find no error in the district court's dismissal of Hagy's complaint against the state.

D. Rule 11 Sanctions

[9] [10] Vance, as counsel for Hagy, challenges the district court's order imposing ****438 *624** Rule 11 sanctions against him individually. In determining whether a district court's imposition of Rule 11 sanctions is proper, we determine: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

[11] [12] Pursuant to I.R.C.P. 11(a)(1), pleadings, motions, and other papers signed by an attorney must meet certain criteria, and failure to meet such criteria will result in the imposition of sanctions. *See Durrant v. Christensen,* 117 Idaho 70, 74, 785 P.2d 634, 638 (1990). Rule 11(a)(1) requires that pleadings be: (1) well grounded in fact; (2) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (3) not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increases in the costs of litigation. In evaluating an attorney's conduct in filing a pleading, the district court must determine whether the attorney exercised reasonableness under the circumstances and made a proper investigation upon reasonable inquiry into the facts and legal theories before signing and filing the document. *Riggins v. Smith,* 126 Idaho 1017, 1021, 895 P.2d 1210, 1214 (1995).

The district court ordered sanctions against Vance after finding that Hagy's complaint was commenced without conducting any investigation. The district court concluded, as a matter of law, that sanctions were proper based on the frivolous and unsupported pursuit of the action and Vance's failure to provide the district court with any

evidence to support the allegations made in the complaint.

After a review of the record in this case, we conclude that the district court did not err in imposing sanctions in favor of the city and county. At a hearing held on September 11, 2000, Vance represented to the district court that a private investigator had been hired and that the county's and city's actions after Karen's death had been investigated thoroughly. Vance was unable to produce the private investigator's reports or even recall the investigator's name. Vance never requested a copy of the police report regarding Karen's death. The record reveals that Vance did not make a reasonable inquiry into the facts prior to filing Hagy's initial complaint. It is also clear from the record that Vance failed to make a reasonable inquiry into the law involved as required by Rule 11. Hagy alleged a civil case against the city and county for a cause of action that, under clear precedent, is not recognized in this state.

[13] Rule 11 sanctions, however, were not proper to be awarded in favor of the state. Although we have determined that Hagy had no standing to file suit on behalf of his mother's estate and did not give any notice to the state that he was filing a claim regarding his mother's death, a legitimate argument can be proffered on those issues. Accordingly, we affirm the district court's order imposing Rule 11 sanctions against Vance in favor of the city and county, but vacate as to any award in favor of the state. Because the district court did not delineate individual amounts awarded to each defendant, we must remand for a determination of such.

E. Attorney Fees on Appeal

[14] [15] On appeal, the state, county, and city seek an award of attorney's fees, claiming that Hagy's appeal was pursued frivolously, unreasonably and without foundation. An award of attorney fees may be granted to the prevailing party pursuant to I.C. § 12–121 and I.A.R. 41. *Excel Leasing Co. v. Christensen,* 115 Idaho 708, 712, 769 P.2d 585, 589 (Ct.App.1989). Such an award is appropriate when the court is left with the abiding belief that the appeal has been brought, or defended frivolously, unreasonably, or without foundation. *Id.* However, attorney fees will not be awarded where the losing party brought the appeal in good faith and where a genuine issue of law was presented. *Minich v. Gem State Developers, Inc.,* 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979).

****439 *625** After having thoroughly reviewed all the issues raised and the arguments presented on this appeal, we are left with the abiding belief that Hagy's appeal against the city and county was brought frivolously, unreasonably, and without legal or factual foundation. As he did below, Hagy urged this Court to grant relief for a cause of action that is not recognized in this state. Therefore, we award the county and city attorney fees on appeal. For the same reasons that we vacate the Rule 11 sanction awarded below, no attorney fees will be awarded to the state on appeal.

IV.

CONCLUSION

The district court did not err in dismissing Hagy's complaint against the state, county, and city. Negligent investigation is not a recognized cause of action in this state. Hagy did not have standing to bring a claim for Karen's death on behalf of his mother's estate. Furthermore, although Hagy had standing to pursue a tort claim against the state for the death of his mother, his notice of tort claim failed to give adequate notice to the state regarding that claim. Accordingly, the district court's orders dismissing Hagy's complaint are affirmed. In addition, the district court's order imposing sanctions against Vance in favor of the city and county is affirmed. Costs and attorney fees on appeal are awarded to the county and city. The Rule 11 sanctions awarded to the state, however, are vacated and remanded. Costs, but not attorney fees, on appeal are awarded to the state.

Judge LANSING and Judge GUTIERREZ, concur.

Parallel Citations

51 P.3d 432

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615 F.3d 1151
United States Court of Appeals, Ninth Circuit.

Gregory S. HAWN; Michael R. Prince; Aric A. Aldrich, Plaintiffs–Appellants,
v.
EXECUTIVE JET MANAGEMENT, INC., Defendant–Appellee.

No. 08–15903. | Argued and Submitted Jan. 12, 2010. | Filed Aug. 16, 2010.

Synopsis

Background: Terminated airline pilots brought Title VII action against employer, alleging that they were discriminated against on basis of gender, race, and national origin when they were discharged for allegedly sexually harassing flight attendant. Employer moved for summary judgment. The United States District Court for the District of Arizona, Stephen M. McNamee, J., 546 F.Supp.2d 703, granted employer's motion. Pilots appealed.

Holdings: The Court of Appeals, Wallace, Senior Circuit Judge, held that:
[1] pilots were required to show that they were similarly situated to female flight attendants;
[2] pilots failed to show that they were similarly situated to flight attendants; and
[3] pilots were not entitled to strike Equal Employment Opportunity Commission (EEOC) probable cause determination.

Affirmed.

West Headnotes (12)

[1] **Civil Rights**
Effect of prima facie case; shifting burden

Court of Appeals analyzes plaintiffs' Title VII claims through the burden-shifting framework of *McDonnell Douglas*, under which plaintiffs must first establish a prima facie case of employment discrimination; if plaintiffs establish a prima facie case, the burden of production, but not persuasion, then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action, and if defendant meets that burden, plaintiffs must then raise a triable issue of material fact as to whether the defendant's proffered reasons for their terminations are mere pretext for unlawful discrimination. Civil Rights Act of 1964, § 703, 42 U.S.C.A. § 2000e–2; 42 U.S.C.A. § 1981.

29 Cases that cite this headnote

[2] **Civil Rights**
Prima facie case

To establish a prima facie case in a Title VII action, plaintiffs must offer evidence that gives rise to an inference of unlawful discrimination. Civil Rights Act of 1964, § 703, 42 U.S.C.A. § 2000e–2; 42 U.S.C.A. § 1981.

6 Cases that cite this headnote

[3] **Civil Rights**
Practices prohibited or required in general; elements
Civil Rights
Prima facie case

Plaintiffs may establish a prima facie case in a Title VII action based on circumstantial evidence by showing: (1) that they are members of a protected class; (2) that they were qualified for their positions and performing their jobs satisfactorily; (3) that they experienced adverse employment actions; and (4) that similarly situated individuals outside their protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. Civil Rights Act of 1964, § 703, 42 U.S.C.A. § 2000e–2; 42 U.S.C.A. § 1981.

25 Cases that cite this headnote

[4] **Civil Rights**
Discrimination against men; reverse

discrimination

Male airline pilots who brought Title VII action against employer after they were terminated for alleged sexual harassment of female flight attendant, were required, as part of prima facie case, to show that they were similarly situated to female flight attendants who were not terminated for allegedly engaging in similar conduct, where plaintiffs themselves invoked the comparison to make out a claim of disparate treatment. Civil Rights Act of 1964, § 703, 42 U.S.C.A. § 2000e–2; 42 U.S.C.A. § 1981.

1 Cases that cite this headnote

[5] **Civil Rights**
Presumptions, Inferences, and Burden of Proof

A Title VII plaintiff may show an inference of discrimination in whatever manner is appropriate in the particular circumstances, and may do so through comparison to similarly situated individuals, or any other circumstances surrounding the adverse employment action that give rise to an inference of discrimination. Civil Rights Act of 1964, § 703, 42 U.S.C.A. § 2000e–2; 42 U.S.C.A. § 1981.

11 Cases that cite this headnote

[6] **Civil Rights**
Discrimination against men; reverse discrimination

Strict "same supervisor" requirement did not apply to male airline pilots who brought Title VII claims against employer after they were terminated for alleged sexual harassment of female flight attendant, alleging that similarly situated female flight attendants received more favorable treatment despite similar behavior; whether plaintiffs and the female flight attendants shared the same direct supervisor should not have been determinative of whether they were similarly situated, because plaintiffs' direct supervisor was excluded from the decision to terminate them. Civil Rights Act of 1964, § 703, 42 U.S.C.A. § 2000e–2; 42 U.S.C.A. § 1981.

7 Cases that cite this headnote

[7] **Civil Rights**
Questions of law or fact

For purposes of making prima facie case in Title VII case, similarity between two persons or groups of people is a question of fact that cannot be mechanically resolved by determining whether they had the same supervisor without attention to the underlying issues. Civil Rights Act of 1964, § 703, 42 U.S.C.A. § 2000e–2; 42 U.S.C.A. § 1981.

1 Cases that cite this headnote

[8] **Civil Rights**
Prima facie case

Under *McDonnell Douglas* burden-shifting framework, a Title VII plaintiff's burden is much less at the prima facie stage than at the pretext stage. Civil Rights Act of 1964, § 703, 42 U.S.C.A. § 2000e–2; 42 U.S.C.A. § 1981.

12 Cases that cite this headnote

[9] **Civil Rights**
Effect of prima facie case; shifting burden

McDonnell Douglas burden-shifting framework in a Title VII action is not intended to be rigid, mechanized, or ritualistic; rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. Civil Rights Act of 1964, § 703, 42 U.S.C.A. § 2000e–2; 42 U.S.C.A. § 1981.

1 Cases that cite this headnote

[10] **Civil Rights**
Discrimination against men; reverse discrimination

Male airline pilots who brought Title VII action against employer after they were terminated for alleged sexual harassment of female flight attendant failed to demonstrate that female flight attendants who allegedly engaged in similar behavior but were not terminated were similarly situated; although pilots alleged that flight attendants engaged in sexualized banter and other conduct similar to what pilots were accused of, only the pilots' conduct gave rise to a complaint of sexual harassment, and pilots never complained of discriminatory treatment or sexual harassment to employer contemporaneous to the alleged conduct by the female flight attendants or otherwise indicated that the conduct was unwelcome or harassing. Civil Rights Act of 1964, § 703, 42 U.S.C.A. § 2000e–2; 42 U.S.C.A. § 1981.

3 Cases that cite this headnote

[11] **Civil Rights**
Admissibility of evidence; statistical evidence

General rule that a plaintiff has a right to introduce an Equal Employment Opportunity Commission (EEOC) probable cause determination in a Title VII lawsuit is not applicable to all EEOC determinations, and district court should exercise its discretion to admit or exclude a letter of violation. Civil Rights Act of 1964, § 703, 42 U.S.C.A. § 2000e–2; 42 U.S.C.A. § 1981.

2 Cases that cite this headnote

[12] **Federal Civil Procedure**
Admissibility

Terminated male airline pilots who brought Title VII action against employer after they were terminated for alleged sexual harassment of female flight attendant were not entitled to strike Equal Employment Opportunity Commission (EEOC) probable cause determination based on charge by flight attendant, which found evidence of a hostile work environment; pilots' motion to strike was made in the context of a summary judgment proceeding where there could be no jury and pilots made no showing of prejudice from its admission. Civil Rights Act of 1964, § 703, 42 U.S.C.A. § 2000e–2; 42 U.S.C.A. § 1981.

1 Cases that cite this headnote

Attorneys and Law Firms

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Appeal from the United States District Court for the District of Arizona, Stephen M. McNamee, District Judge, Presiding. D.C. No. 2:04–CV–02954–SMM.
Before ALEX KOZINSKI, Chief Judge, J. CLIFFORD WALLACE, Circuit Judge, and WILLIAM H. ALSUP, District Judge.*

Opinion

OPINION

WALLACE, Senior Circuit Judge:

Gregory Hawn, Michael Prince and Aric Aldrich (collectively, plaintiffs) appeal from the district court's summary judgment in favor of their former employer, Executive Jet Management (Executive Jet). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I.

Plaintiffs are male pilots who were employed by Executive Jet, which is in the business of aircraft management and charter operations. All of the plaintiffs were terminated after a female flight attendant, Robin McCrea, alleged that

plaintiffs had sexually harassed her and created a hostile work environment through an array of conduct including sexualized banter, crude jokes, and the sharing of crude and/or pornographic emails and websites. According to plaintiffs, however, McCrea was an active participant in, or initiator of, much of the conduct of which she accused them. Plaintiffs contend that their terminations were illegal because McCrea and other Executive Jet female flight attendants engaged in similar conduct but were not terminated because they were females.

Plaintiffs and McCrea were stationed at Executive Jet's base at Williams Gateway Airport in Arizona. On January 6, 2003, McCrea complained to her immediate supervisor, Amy Jackson, that Aldrich had behaved inappropriately during a training seminar a few days earlier. Jackson reported the complaint to Executive Jet's Human Resources Director, Cynthia Brusman. On January 10, 2003, McCrea faxed a letter to Brusman that stated she had experienced a hostile work environment at ***1154** the Williams Gateway base and requested a transfer.

In response, Executive Jet's Chief Pilot, Michael Chakerian, interviewed McCrea, Aldrich, Prince, and several other Executive Jet employees. Chakerian submitted the results of his interviews in a written report to Executive Jet. Chakerian's report reflected that Prince and Aldrich were "shocked" by McCrea's allegations because she had participated in, and often encouraged, the banter and joking of which she complained. Chakerian's report also reflected that another male pilot stationed at the Williams Gateway base was similarly surprised by McCrea's allegations. A female flight attendant interviewed by Chakerian described McCrea as short-tempered, aggressive, and negative. A female pilot interviewed by Chakerian similarly described McCrea as personally insecure and moody, and also described McCrea as flustered during the training exercise. Both this female pilot and the female flight attendant implied to Chakerian that McCrea's allegations may have been motivated by her desire for a transfer to a different Executive Jet base.

On January 14, 2003, McCrea faxed another letter to Brusman. This time, McCrea attached a twelve-page document that detailed her allegations against Aldrich stemming from the training seminar. This document also contained new allegations of sexual harassment against Aldrich, Prince, Hawn, and others. Following receipt of these new and more detailed allegations, Executive Jet hired an independent investigator, James Sterling, to look into McCrea's accusations. This investigation lasted approximately two months. In the meantime, on January 27, 2003, McCrea filed a discrimination charge against Executive Jet with the United States Equal Employment Opportunity Commission (EEOC).

Around March 31, 2003, Sterling's report was submitted to Executive Jet. In the "Synopsis" of his report, Sterling stated:

> The results of this investigation indicate that there have been confirmed instances of a few of the behaviors indicated in Ms. McCrea's document of complaint. However, there are also a greater number of incidents that she has alleged happened that have been unconfirmed, denied or told to me in a different light, implying that Ms. McCrea either participated in the actions or in some instances initiated them.

In the concluding "Summary" of his report, Sterling stated that "[t]hroughout the duration of this investigation, I have continually found there to be some items in Ms. McCrea's document of complaint to be verified." Sterling continued, "in the same vein, I must say that there have been numerous items, which have not been corroborated by this investigation." He concluded: "The bottom line is that there appears to be some fact as well as some fiction interwoven throughout Ms. McCrea's document of complaint.... To conclude this investigation I believe that the company will have to 'sift the wheat from the [chaff],' in Ms. McCrea's document of complaint...."

On April 18, 2003, all three plaintiffs were terminated. A few months later, in July 2003, the EEOC issued a determination of the merits of McCrea's complaint, finding in part that "the evidence revealed that Respondent fostered a hostile work environment created by demeaning, crude, derogatory sex-based remarks."

In February 2004, each of the plaintiffs filed a claim of discrimination with the EEOC. All of these claims were dismissed. Plaintiffs subsequently filed this action, alleging discrimination on the basis of race, sex and national origin in violation of Title ***1155** VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2 and 42 U.S.C. § 1981.

Plaintiffs complain that Executive Jet was aware that a group of five female flight attendants, one of whom was McCrea, had "engaged in sexual e-mails [and] sexual discussions" similar to the conduct that led to plaintiffs' terminations. Unlike plaintiffs, however, the female employees were not disciplined in any way, much less terminated. Plaintiffs argue that their terminations were thus discriminatory because, in effect, Executive Jet singled them out for termination because they were "risk

free" young, white, American males, while it failed to terminate females who had engaged in the same objectionable behavior. Plaintiffs point, in particular, to Executive Jet's position statement in its response to McCrea's EEOC charges. In that document, the company represented that "virtually all" of McCrea's claims were denied or uncorroborated and that, in many instances, McCrea was a participant in or initiator of the conduct at issue. According to plaintiffs, McCrea's allegations came suspiciously on the heels of a training exercise in which she exhibited an abysmal performance.

The district court entered summary judgment in favor of Executive Jet, concluding that plaintiffs failed to establish a prima facie case of employment discrimination. The district court also concluded that plaintiffs failed to raise a triable issue of material fact that their terminations were a pretext for unlawful discrimination. Plaintiffs seek review of the summary judgment and the district court's denial of their motion to exclude all evidence of and references to the EEOC's determination regarding McCrea's charge. Although plaintiffs' complaint states claims for gender, race, and national origin discrimination, plaintiffs press only their gender discrimination claims before us. Similarly, although plaintiffs asked the district court to strike all references to the EEOC's determination in McCrea's charge and the EEOC's dismissal of their complaints, plaintiffs here press only for the exclusion of evidence relating to the EEOC's determination of McCrea's charges.

II.

We review the district court's summary judgment de novo. *Universal Health Servs., Inc. v. Thompson,* 363 F.3d 1013, 1019 (9th Cir.2004). "We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *EEOC v. Luce, Forward, Hamilton & Scripps,* 345 F.3d 742, 746 (9th Cir.2003). We may affirm the district court's summary judgment on any ground supported by the record. *Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd. of Las Vegas,* 257 F.3d 937, 941 (9th Cir.2001).

[1] We analyze plaintiffs' Title VII claims through the burden-shifting framework of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Under this analysis, plaintiffs must first establish a prima facie case of employment discrimination. *Noyes v. Kelly Servs.,* 488 F.3d 1163, 1168 (9th Cir.2007). If plaintiffs establish a prima facie case, "[t]he burden of production, but not persuasion, then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action." *Chuang v. Univ. of Cal. Davis, Bd. of Trs.,* 225 F.3d 1115, 1123–24 (9th Cir.2000). If defendant meets this burden, plaintiffs must then raise a triable issue of material fact as to whether the defendant's proffered reasons for their terminations are mere pretext for unlawful discrimination. *Noyes,* 488 F.3d at 1168; *see also Coleman* ***1156** *v. Quaker Oats Co.,* 232 F.3d 1271, 1282 (9th Cir.2000) (plaintiffs must "introduce evidence sufficient to raise a genuine issue of material fact" as to pretext).

[2] **[3]** To establish a prima facie case, plaintiffs "must offer evidence that 'give[s] rise to an inference of unlawful discrimination.' " *Godwin v. Hunt Wesson, Inc.,* 150 F.3d 1217, 1220 (9th Cir.1998) (alteration in original), *citing Tex. Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Plaintiffs may establish a prima facie case based on circumstantial evidence by showing: (1) that they are members of a protected class; (2) that they were qualified for their positions and performing their jobs satisfactorily; (3) that they experienced adverse employment actions; and (4) that "similarly situated individuals outside [their] protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination." *Peterson v. Hewlett–Packard Co.,* 358 F.3d 599, 603 (9th Cir.2004); *see also Wallis v. J.R. Simplot Co.,* 26 F.3d 885, 889 (9th Cir.1994).

The focus in the case before us is on the fourth element of plaintiffs' prima facie case: whether similarly situated employees engaged in similar conduct but received more favorable treatment by Executive Jet. The district court concluded that plaintiffs failed to establish a prima facie case because they did not show that the female employees who allegedly received more favorable treatment by Executive Jet were in fact similarly situated to plaintiffs. The district court offered two primary reasons for this conclusion: First, the female flight attendants were not similarly situated because they did not report to the same supervisor as plaintiffs, and second, even if the female flight attendants had reported to the same supervisor as plaintiffs, they were not similarly situated because plaintiffs' conduct gave rise to a complaint, while the female flight attendants' alleged conduct did not.

A.

[4] At the outset, plaintiffs assert that the district court engaged in an overly narrow inquiry in conducting its examination of their prima facie case. Plaintiffs complain

that the district court erroneously focused on whether similarly-situated persons received more favorable treatment. Instead, according to plaintiffs, the district court should have looked more broadly at whether the record as a whole gave rise to an inference of discrimination.

[5] It is true that the elements and contours of a prima facie case will differ according to the facts at hand. In *McDonnell Douglas,* the Court explained that a prima facie case will vary according to the unique factual circumstances presented in every action: "the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802 n. 13, 93 S.Ct. 1817. We have also stated that a plaintiff may show "an inference of discrimination in whatever manner is appropriate in the particular circumstances." *Diaz v. Am. Tel. & Tel.,* 752 F.2d 1356, 1361 (9th Cir.1985). A plaintiff may do so through comparison to similarly situated individuals, or any other circumstances "surrounding the adverse employment action [that] give rise to an inference of discrimination." *Peterson,* 358 F.3d at 603.

Here, however, plaintiffs' case *relies* on a comparison between themselves and a group of female employees. Plaintiffs' action sounds in disparate treatment and seeks to raise an inference of discrimination based solely on circumstantial evidence. Plaintiffs' proof of discrimination is that McCrea engaged in or encouraged the ***1157** language and conduct of which she later complained, and that she and other female flight attendants engaged in lewd and inappropriate conduct but were not disciplined or terminated as were plaintiffs. Plaintiffs invoke the comparison to a group of allegedly similarly situated female employees to make out a claim of disparate treatment. The district court did not err by focusing on the inference of discrimination that is central to plaintiffs' case.

B.

Plaintiffs next take issue with the district court's analysis insofar as it determined that plaintiffs and the suspect female flight attendants were not similarly-situated because they did not report to the same supervisor. The district court held that to be similarly situated, "coworkers must have been dealt with by the same supervisor, subject to the same standard, and engaged in similar conduct." Plaintiffs argue that the district court improperly focused on whether the female employees had the same supervisor as them.

[6] It was error for the district court to impose a strict "same supervisor" requirement. We have stated that "whether two employees are similarly situated is ordinarily a question of fact." *Beck v. United Food & Commercial Workers Union Local 99,* 506 F.3d 874, 885 n. 5 (9th Cir.2007). The employees' roles need not be identical; they must only be similar "in all material respects." *Moran v. Selig,* 447 F.3d 748, 755 (9th Cir.2006); *see also Aragon v. Republic Silver State Disposal, Inc.,* 292 F.3d 654, 660 (9th Cir.2002). Materiality will depend on context and the facts of the case.

Generally, we have determined that "individuals are similarly situated when they have similar jobs and display similar conduct." *Vasquez v. County of Los Angeles,* 349 F.3d 634, 641 (9th Cir.2003). In *Vasquez,* for example, we considered that employees were not similarly situated where the type and severity of an alleged offense was dissimilar. *Id.* Likewise, in *Nicholson v. Hyannis Air Service, Inc.,* a case decided after entry of summary judgment here, we held that an alleged distinction between a female pilot and several male pilots was not material. 580 F.3d 1116, 1125–26 (9th Cir.2009). Under the allegations of that case, we concluded that a female pilot, who had deficient communication and cooperation skills, was similarly situated to male pilots, who had deficiencies in their technical piloting skills, because both types of deficiencies could be addressed through retraining. Any distinction between the two types of skill sets was "not material for purposes of determining whether the male pilots were 'similarly situated' to" the plaintiff; therefore, the female pilot had made out a prima facie case of discrimination by showing that the male pilots received remedial training for their deficiencies while she received no such instruction. *Id.* at 1126. *Nicholson* again demonstrates that whether employees are similarly situated—*i.e.,* whether they are "similar in all *material* respects," *id.* at 1125 (internal quotation marks omitted)—is a fact-intensive inquiry, and what facts are material will vary depending on the case.

[7] We do not exclude the possibility that the presence or absence of a shared supervisor might be relevant in some cases. But here, the undisputed facts demonstrate that whether plaintiffs and the female flight attendants shared the same direct supervisor should not have been determinative of whether they were similarly situated, because plaintiffs' direct supervisor, Chakerian, was excluded from the decision to terminate them. Instead, the decision to terminate plaintiffs was made directly by Executive Jet's president, Albert Pod. The fact that plaintiffs and the female flight attendants had different ***1158** direct supervisors did not render them dissimilar in a material respect, because the relevant decision-maker, Albert Pod, was aware of both the allegations against plaintiffs and the allegations plaintiffs had made against

the female flight attendants. Similarity between two persons or groups of people is a question of fact that cannot be mechanically resolved by determining whether they had the same supervisor without attention to the underlying issues.

III.

Therefore, we turn to the alternate ground on which the district court concluded that plaintiffs were not similarly situated to the female flight attendants. The district court held that, *even assuming* the female flight attendants reported to the same supervisor as plaintiffs, the two groups were not similarly situated because the female employees' alleged conduct was not unwelcome and never resulted in a complaint. This consideration provides an independent and sufficient basis to affirm the district court's summary judgment. *See Venetian Casino Resort,* 257 F.3d at 941.

A.

The concept of "similarly situated" employees may be relevant to both the first and third steps of the *McDonnell Douglas* framework. In this case, plaintiffs sought to establish that the relevant female flight attendants were "similarly situated" to them but received more favorable treatment in step one of the *McDonnell Douglas* analysis. *See, e.g., Peterson,* 358 F.3d at 603. Turning to step three of the *McDonnell Douglas* analysis, plaintiffs alleged that Executive Jet's explanation for their terminations was pretextual because, among other things, the company failed to discipline or terminate McCrea even though she was similarly situated to them. *See Vasquez,* 349 F.3d at 641; *see generally Fonseca v. Sysco Food Servs. of Ariz., Inc.,* 374 F.3d 840, 849 (9th Cir.2004) (describing different ways in which an employment discrimination plaintiff might establish pretext).

[8] Even though a comparison to "similarly situated" individuals may be relevant both to plaintiffs' prima facie case and proof of pretext, these inquiries constitute distinct stages of the *McDonnell Douglas* burden-shifting analysis. *See generally Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978); *Lynn v. Regents of the Univ. of Cal.,* 656 F.2d 1337 (9th Cir.1981) (first and third stages must remain distinct because, "[t]o do otherwise would in many instances collapse the three step analysis into a single step at which all issues would be resolved"); *Nicholson,* 580 F.3d at 1124. The difference between the first and third steps of the *McDonnell Douglas* framework is not without some consequence. Among other things, a plaintiff's burden is much less at the prima facie stage than at the pretext stage. *Compare Tex. Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), *and Wallis,* 26 F.3d at 889, *with Godwin,* 150 F.3d at 1220–22, *and Steckl v. Motorola, Inc.,* 703 F.2d 392, 393 (9th Cir.1983) (requiring "specific, substantial evidence of pretext" to defeat employer's motion for summary judgment); *see also Wheeler v. Aventis Pharm.,* 360 F.3d 853, 857 (8th Cir.2004) (describing pretext stage as "rigorous," but prima facie stage as "not onerous").

The district court considered the relevant inquiry—whether plaintiffs and the subject female employees were similarly situated—in the context of both plaintiffs' prima facie case and at the pretext stage. Insofar as the district court considered Executive Jet's argument in the context of plaintiffs' prima facie case of discrimination, ***1159** this was unusual. Our cases generally analyze an employer's reasons for why employees are not similarly situated at the pretext stage of *McDonnell Douglas,* not the prima facie stage. *See, e.g., Vasquez,* 349 F.3d at 641. It may well be that the present inquiry is more appropriate for resolution at the third stage of the *McDonnell Douglas* analysis rather than that of pretext. The pretext determination is often cast in terms of the legitimate, nondiscriminatory reason offered by the employer for taking adverse employment action against a plaintiff. *See, e.g., Vasquez,* 349 F.3d at 641; *Wall v. Nat'l R.R. Passenger Corp.,* 718 F.2d 906, 909 (9th Cir.1983).

[9] Although we seek to conduct our inquiry at the proper *McDonnell Douglas* step, we keep in mind that "[t]he *prima facie* case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.' " *U.S. Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 715, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983), *citing Furnco,* 438 U.S. at 577, 98 S.Ct. 2943. Thus, we keep sight of the ultimate issue in this case: "whether the employer is treating some people less favorably than others because of their race, color, religion, sex, or national origin." *Furnco,* 438 U.S. at 577, 98 S.Ct. 2943 (quotation marks and citation omitted). In this case, there is no need to discuss the issue further. The district court held that plaintiffs had not made out a prima face case because, among other reasons, they had not shown they were similarly situated to the female employees in question. The district court then went on to hold that Executive Jet's argument was not pretextual for the same reasons. We may therefore turn to the substance of plaintiffs' claims.

B.

[10] Turning to the substance of the issue, plaintiffs seek to blunt the relevance of the complaints made against them. They argue that the presence or absence of a complaint is not a sufficient justification for differential treatment and that McCrea's complaint was not actually the basis for their terminations. Plaintiffs point to (1) the Sterling report, which reflected that many of McCrea's allegations were uncorroborated; (2) Executive Jet's position statement submitted to the EEOC, in which it maintained that McCrea could not establish a prima facie case of discrimination because the "overwhelming majority" of the incidents could not be corroborated and McCrea could not show that the conduct was unwelcome; and finally, (3) Brusman's testimony that the use of sexual language or the telling of sexual jokes to coworkers was inappropriate behavior warranting termination, "whether anybody is offended by it or not."

Executive Jet management was aware, at the time of plaintiffs' terminations, of plaintiffs' accusations that McCrea and several female flight attendants had engaged in sexualized banter and other similar conduct. Chakerian's report to his superiors indicated that plaintiffs Aldrich and Prince found McCrea's allegations surprising because she had participated in the conduct giving rise to her complaint. Sterling's report reflected an allegation by Prince that McCrea had "hit him on the butt twice," an allegation by Aldrich that McCrea asked "quite frequently about his sex life," and allegations that McCrea participated in "raunchy" banter, as well as some sexually-oriented emails sent by another flight attendant.

Plaintiffs' accusations, nevertheless, do not demonstrate that the designated female employees were similarly situated to ***1160** plaintiffs. Plaintiffs cite the Sterling report selectively. The report confirmed several of McCrea's complaints, including that Hawn pinched McCrea on the buttocks; that Prince forwarded obscene emails to his coworkers; that pilots, including Prince, had romantic relationships with flight attendants; and that Aldrich called the lead flight attendant a "fat cow." Sterling's report concludes that "the company will have to 'sift the wheat from the [chaff]' in Ms. McCrea's document of complaint...." Even if Executive Jet believed that the majority of McCrea's allegations were not corroborated, and that McCrea participated in some of the complained-of conduct, several instances of sexually harassing behavior by Aldrich, Prince and Hawn were undisputed.

Moreover, plaintiffs and the female flight attendants are distinguishable because plaintiffs' conduct gave rise to a complaint of sexual harassment, while the female flight attendants' alleged conduct did not. Plaintiffs never complained of discriminatory treatment or sexual harassment to Executive Jet contemporaneous to the alleged conduct by the female flight attendants. When plaintiffs did report such conduct, it was made defensively in the context of the company's investigations into McCrea's accusations against them. Even in the context of the company's investigations, plaintiffs did not lodge a complaint at any time, and they did not report that they found the female flight attendants' alleged conduct harassing or unwelcome. We have distinguished misconduct by one employee from misconduct by another employee on the basis of whether it prompted complaints or consternation by other employees. In *Meyer v. California and Hawaiian Sugar Co.*, we upheld summary judgment for an employer where the female plaintiff had been terminated after making racially insensitive remarks, even though male employees also had made racist remarks but received no discipline, because the female plaintiff's comments "had such an adverse impact on minority employees that they impaired her usefulness in her sensitive duties in the Personnel Department and, coming from her, reflected unfavorably on [the employer's] policies toward its minority employees." 662 F.2d 637, 640 (9th Cir.1981). We concluded that, where there was no evidence that the male employees' remarks had "provoked anything comparable to the vigorous reaction" that resulted from the plaintiff's comments, the other incidents were "not such parallels to her case as to raise a genuine issue of pretext." *Id.*

The presence of complaints has also been deemed a valid distinguishing factor by other circuits. *See Yeager v. City Water & Light Plant,* 454 F.3d 932, 934 (8th Cir.2006) ("An employer that promulgates a sex harassment policy may reasonably distinguish between sexually oriented conduct that elicits a complaint from an offended co-worker, and arguably comparable conduct that is nonetheless tolerated by co-workers without complaint"). In a case presenting similar facts to this action, *Morrow v. Wal–Mart Stores, Inc.*, two male employees were terminated after complaints of sexual harassment were brought against them. 152 F.3d 559, 560 (7th Cir.1998). They filed an action, complaining that their employer had enforced its sexual harassment policy more strictly against males than against similarly-situated females. *Id.* at 560. Affirming the district court's summary judgment in favor of the employer, the Seventh Circuit stated,

> Wal–Mart's quick decision to terminate the plaintiffs may seem unfair in a work environment that appears rife with similarly off-color conduct.... Although some of Wal–Mart's female employees seem to have engaged in questionable behavior, there is no evidence that any of

> this behavior sparked complaints of ***1161** harassment like those that Wal–Mart received concerning [plaintiffs]. Without evidence of similar employee complaints, Wal–Mart cannot be faulted for failing to respond to these incidents in the same way that it responded to [plaintiffs'] situations.

Id. at 564.

We do not support a "race to the Human Resources office" as the sole determinant of the relevance of a complaint. The existence of a complaint may not always be material or determinative in light of the facts in a given case. We stress again that the determination whether a plaintiff and a coworker are similarly situated will generally be a question of fact. But in the case before us, plaintiffs' conduct was the subject of a complaint to Executive Jet, while the conduct of McCrea and other female flight attendants was not. Moreover, plaintiffs' reports of inappropriate conduct by female employees were made only in the context of the independent investigation by an outsider, and contain no indication that the conduct was unwelcome or harassing to them. In the course of that investigation, several allegations of harassing conduct by plaintiffs was not only corroborated, but also admitted by plaintiffs. That difference was properly taken into consideration when the district court entered summary judgment.

IV.

[11] In *Plummer v. Western International Hotels Co.*, we held that a plaintiff has a "right to introduce an EEOC probable cause determination in a Title VII lawsuit." 656 F.2d 502, 505 (9th Cir.1981). But *Plummer*'s rule was created in the context of the admissibility of an EEOC probable cause determination in a Title VII action by the same plaintiff who complained to the EEOC. The *Plummer* rule is not applicable to all EEOC determinations. In *Gilchrist v. Jim Slemons Imports, Inc.*, we held that a letter of violation was a "substantially different" document than an EEOC probable cause determination in that a letter of violation represented the EEOC's conclusion that a violation has occurred. The letter of violation thereby posed a much greater risk of unfair prejudice, because a "jury may find it difficult to evaluate independently evidence of age discrimination after being informed that the EEOC has already examined the evidence and found a violation." 803 F.2d 1488, 1500 (9th Cir.1986). We therefore concluded that *Plummer* did not establish a per se rule of admissibility for all EEOC documents, and that the district court should instead exercise its discretion to admit or exclude a letter of violation. *Id.*

[12] Plaintiffs argue that the district court abused its discretion by denying their motion to strike all reference to the EEOC's determination in the McCrea charge. They assert that, because the rule of per se admissibility of EEOC findings applies "only in cases in which the issue in the court proceeding was identical to that which the EEOC had earlier investigated," the EEOC's determination should not have been admitted here. Further, plaintiffs assert that the McCrea determination is irrelevant because it was issued months after they were terminated.

Admission of the EEOC determination was not an abuse of discretion. As *Plummer* stated, there is little reason to fear prejudice in a bench trial, where "the admission of incompetent evidence over objection will not ordinarily be a ground of reversal if there was competent evidence received sufficient to support the findings. The judge will be presumed to have disregarded the inadmissible and relied on the competent evidence." *Plummer,* 656 F.2d at 505 (internal quotation marks omitted). The same rationale applies here, where plaintiffs' motion to strike was made in the ***1162** context of a summary judgment proceeding where there could be no jury, thereby reducing the danger of the type of prejudice expressed in *Gilchrist. See Plummer,* 656 F.2d at 505 ("[T]here is support for the general proposition that the admissibility of evidence varies between jury and non-jury trials"). The district court exercised its discretion in weighing the admissibility of the document, as required under *Gilchrist*, and plaintiffs have made no showing of prejudice from its admission.

AFFIRMED.

Parallel Citations

109 Fair Empl.Prac.Cas. (BNA) 1824, 10 Cal. Daily Op. Serv. 10,544, 2010 Daily Journal D.A.R. 12,784

Footnotes

* The Honorable William H. Alsup, United States District Judge for the Northern District of California, sitting by designation.

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103 Idaho 33
Supreme Court of Idaho.

Betty HOPPE, an individual, Plaintiff-Appellant, v. Scott McDONALD, Director of the Idaho Department of Employment and the IdahoDepartment of Employment, Defendants-Respondents.

No. 13659. | April 27, 1982.

After the Supreme Court, 100 Idaho 133, 594 P.2d 643, reversed and remanded judgment of the District Court in favor of former female employee in sex discrimination suit, the District Court, Twin Falls County, Theron W. Ward, J., on remand, held that employer had not discriminated against former employee on the basis of her sex, and she appealed. The Supreme Court, Shepard, J., held that: (1) trial court had authority to try case of advisory jury on its own motion; (2) substantial evidence supported finding that female employee was not denied promotion by reason of her sex; and (3) substantial and competent evidence supported finding that female employee was not denied equal pay to that of male employees on the basis of her sex.

Affirmed.

Bistline, J., filed opinion concurring and dissenting.

West Headnotes (8)

[1] **Appeal and Error**
⇐Necessity of Objections in General

A litigant may not remain silent as to claimed error during trial and later urge his objections thereto for the first time on appeal.

11 Cases that cite this headnote

[2] **Appeal and Error**
⇐Necessity of Objections in General
Appeal and Error
⇐Organization and Jurisdiction of Lower Court
Appeal and Error
⇐Failure to State Cause of Action

Ordinarily an objection not made at trial will not be considered on appeal unless objection raises a question of jurisdiction or that pleading fails to state cause of action.

6 Cases that cite this headnote

[3] **Appeal and Error**
⇐Mode and Conduct of Trial or Hearing
Trial
⇐Conclusiveness

Although sex discrimination action was one triable of right by jury and neither party demanded jury trial, trial court had authority on its own motion to try the case with an advisory jury, because neither party objected to the advisory jury; in addition, the court's action did not constitute "plain" or "fundamental" error. Rules Civ.Proc., Rule 39(c).

1 Cases that cite this headnote

[4] **Civil Rights**
⇐Employment Practices

Record did not support finding of sex discrimination suit that trial court depended upon advisory jury's answers to the court's interrogatories, rather, it demonstrated that trial court did not believe itself bound by advisory jury's findings and instead made its own independent findings of fact.

[5] **Civil Rights**
⇐Employment Practices

A plaintiff alleging unlawful discrimination must prove by preponderance of evidence that

she applied for an available position for which she was qualified but was rejected under circumstances which give rise to inference of unlawful discrimination.

1 Cases that cite this headnote

[6] **Civil Rights**
⇐Employment Practices

Evidence, including proof that female employee was not rated among top three candidates for job promotion and that she was not even the top-rated female applicant, that employee was rejected because of her lack of qualifications relative to the other applicants, that is, that she had no experience in field of unemployment insurance, she had no supervisory experience, and that individual selected for position had experience in all of employer's programs and had exhibited superior performance in supervisory position for nearly three years, supported finding that promotion was not denied to female employee on basis of her sex.

[7] **Labor and Employment**
⇐Equal Work; Skill, Effort, and Responsibility
Labor and Employment
⇐Presumptions and Burden of Proof

Claimant has burden of proving that she did not receive equal pay for equal work but is not required to show that jobs performed were identical, rather, unlawful discrimination may be shown by proving that the skill, efforts and responsibility required in performance of the jobs are substantially equal; in that determination, it is the actual job performance in content which is significant rather than job titles, classifications or descriptions, so that it is the overall job, and not its individual segments, which must form the basis of comparison. Fair Labor Standards Act of 1938, § 6(d) as amended 29 U.S.C.A. § 206(d); I.C. § 67-5909.

2 Cases that cite this headnote

[8] **Civil Rights**
⇐Employment Practices

Substantial and competent evidence supported findings that female employee did not perform work equivalent in nature to work being performed by male employees in higher pay grades, and that therefore she was not denied pay equal to that of male employees on the basis of her sex. I.C. § 67-5909; Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1); Fair Labor Standards Act of 1938, § 6(d) as amended 29 U.S.C.A. § 206(d).

Attorneys and Law Firms

***34 **356** Lloyd J. Walker, Twin Falls, for plaintiff-appellant.

David H. Leroy, Atty. Gen., R. LaVar Marsh, Jeanne T. Goodenough, Carol Lynn Brassey, Deputy Attys. Gen., Boise, for defendants-respondents.

Opinion

SHEPARD, Justice.

This is an appeal from a judgment which denied claims of sex discrimination brought by plaintiff-appellant, Betty Hoppe, against her former employers, defendants-respondents. Hoppe asserted that while she was employed by the Department she was, on the basis of her sex, denied a promotion, and also that she did not receive pay equal to male co-employees, although her work was substantially equal in nature to male co-employees. Following trial, the district court held that Hoppe had failed to prove that she had been the victim of any unlawful discrimination. We affirm.

Hoppe was employed in the Twin Falls office of the Department from October 1, 1970, through December 13, 1973. She had no college education but had graduated from high school and had a significant amount of prior work experience. She was hired in the highest job

classification for which she was qualified in view of her prior work experience, i.e. "Interviewer II", in pay grade 7. It is not disputed that Hoppe was an outstanding employee and received excellent job performance evaluations. Although she received no promotions as such, she did receive several in-grade, or "step" pay increases, which were granted automatically upon an employee's satisfactory job performance. As a result of those pay increases, her salary increased over the three-year period of her employment from $527 to $673 per month.

Hoppe was initially assigned the duties of "Selection and Referral Officer" and she worked in that capacity until January, 1972, when she became an "Employer Relations Representative". In May, 1973, Hoppe was additionally assigned a portion of the duties of "Twin Falls Labor Market Analyst". Prior to Hoppe's employment, one Slotten had performed the duties of "Selection and Referral Officer". Slotten's actual job classification was that of "Employment Counselor", and he was in pay grade 10. Hoppe replaced Slotten as "Selection and Referral Officer". In January, 1972, Hoppe was replaced as "Selection and Referral Officer" by one Clark. Clark held a job title of "Employment Counselor" and was in pay grade 10. When Hoppe was assigned to the position of "Employer Relations Representative", she replaced one Omlid, whose job title was "Employment Consultant II", and was in pay grade 10.

*35 **357 During the summer of 1973, an opening was announced for the position of manager of the Department's office in Jerome. Twelve applicants, including Hoppe, applied for the position. A promotional review board was convened and the applicants were rated. The top three rated applicants were certified to a selecting official, and the top rated applicant, a male, was appointed to the position. Hoppe was not rated among the top three applicants, nor was she the highest rated female applicant.

In the fall of 1973, Hoppe applied for a promotion to the classification of "Consultant I" in pay grade 8. That position was to be filled from a register of the individuals who met the minimum qualifications and who had passed an examination. Hoppe took and passed the exam, was approved for the promotion, would have received the promotion in February, 1974, but she resigned from the Department on December 13, 1973.

Thereafter Hoppe filed a complaint with the Idaho State Commission on Human Rights, alleging sex discrimination in the promotion and pay practices of the Department and also asserting that she had been constructively discharged. That Commission found that the practices and procedures of the Department's promotional policies denied women equal opportunity with men, and concluded that the Department had discriminated against Hoppe, recommending, among other measures, that Hoppe be awarded back pay. The Department refused to conciliate and this action resulted. Upon motion for summary judgment, the district court held that it was bound by the findings of the Commission and granted judgment in favor of Hoppe. On appeal, this court held that the findings and recommendations of the Commission on Human Rights had no binding effect on the district court, and therefore reversed and remanded for further proceedings. Hoppe v. Nichols, 100 Idaho 133, 594 P.2d 643 (1979). On remand, a trial de novo was held by the district court, sitting with an advisory jury. The district court held that the Department had not discriminated against Hoppe on the basis of her sex and entered judgment in favor of the Department.

Hoppe first asserts that the district court erred in its utilization of an advisory jury. I.R.C.P. 39(c) provides:

> "In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right."

Here the action was one triable of right by a jury and neither party demanded a jury trial. Hence Hoppe argues that the court was without authority to, on its own motion, try the case with an advisory jury.

[1] [2] [3] Although neither party requested a jury trial or explicitly consented to the use of an advisory jury, neither party objected to the advisory jury. A litigant may not remain silent as to claimed error during a trial and later urge his objections thereto for the first time on appeal. Bradford v. Simpson, 97 Idaho 188, 541 P.2d 612 (1975). Ordinarily an objection not made at trial will not be considered on appeal, Kock v. Elkins, 71 Idaho 50, 225 P.2d 457 (1950), unless the objection raises a question of jurisdiction, Briggs v. Golden Valley Land & Cattle Co., 97 Idaho 427, 546 P.2d 382 (1976), or that the pleading fails to state a cause of action, Webster v. Potlatch Forests, 68 Idaho 1, 187 P.2d 527 (1947). The instant case falls into none of the exceptions to the rule. Nor is this a case in which the trial court committed "plain" or "fundamental" error so substantial as to result in injustice or to take from the appellant a right essential to her case. Johnson v. Elliott, 112 Ariz. 57, 537 P.2d 927 (1975); Heacock v. Town, 419 P.2d 622 (Alaska 1966); cf. State v. Haggard, 94 Idaho 249, 486 P.2d 260 (1971).

[4] Hoppe asserts that the trial court erred in depending upon the advisory jury's answers to the courts interrogatories, rather than making its own independent findings of fact, but this argument is not supported ***36 ****358** by the record. The trial court's memorandum decision contains a detailed discussion of the jury's answers to each interrogatory as well as the court's own factual findings in regard to those interrogatories. While the court's findings are largely in agreement with those of the advisory jury, there is some specific disagreement with the jury's answers and it is thus clear that the trial court did not believe itself bound by the advisory jury's findings and made its own independent findings of fact.

[5] [6] Hoppe next asserts that the trial court erred in its finding that Hoppe was not denied promotion to the position of manager of the Department's Jerome office by reason of her sex. I.C. s 67-5909, upon which Hoppe's claim is based, provides in pertinent part:

> "Acts prohibited. It shall be a prohibited act to discriminate against a person because of, or on the basis of, race, color, religion, sex or national origin, in any of the following:
>
> (1) For an employer to fail or refuse to hire, to discharge, or to otherwise discriminate against an individual with respect to compensation or the terms, conditions or privileges of employment..."

Federal case law under Title VII, 42 U.S.C. s 2000e-2(a), is instructive as to the necessary quantum of proof and the applicable standards for adjudication in sex discrimination cases. Bowles v. Keating, 100 Idaho 808, 606 P.2d 458 (1979).

It is held that a plaintiff alleging unlawful discrimination must prove by a preponderance of the evidence that she applied for an available position, for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); Furnco Construction Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Here Hoppe presented a prima facie case creating the inference of sex discrimination, thus shifting to the Department the burden to "articulate some legitimate nondiscriminatory reason" for Hoppe's rejection. McDonnell Douglas, supra, 411 U.S. at 802, 93 S.Ct. at 1824. Burdine, supra, clarified the nature of the burden that thus shifts to the defendant:

> "The burden that shifts to the defendant ... is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. (citation). It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." 450 U.S. at 254-55, 101 S.Ct. at 1094. (footnotes omitted).

Here the evidence of the Department, if believed by the trial court, rebutted the inference of discrimination raised by Hoppe's prima facie case. The evidence of the Department indicated that Hoppe was not rated among the top three candidates for the job and that she was not even the top-rated female applicant. It also indicated that Hoppe was rejected because of her lack of qualifications relative to the other applicants; i.e., that Hoppe had no experience in the field of unemployment insurance, which was a major program administered by the Department and that she had no supervisory experience. On the other hand, the individual selected for the position had experience in all of the Department's programs, and had exhibited superior performance in a supervisory position ***37 ****359** within the Department for nearly three years.

Thus the Department's evidence could be viewed as articulating a legitimate nondiscriminatory reason for Hoppe's rejection, and further, as tending to indicate that the person hired for the position was better qualified than was Hoppe. Such a showing exceeded that necessary to merely rebut Hoppe's prima facie case. Burdine, supra. The burden of production then returned to Hoppe, merging with her ultimate burden of persuasion as set forth in Burdine, supra.

> "The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, supra, 450 U.S. 256, 101 S.Ct. 1095.

617 F.3d 1273
United States Court of Appeals, Tenth Circuit.

Judy F. JONES, Plaintiff-Appellant,
v.
OKLAHOMA CITY PUBLIC SCHOOLS, Independent School District No. 89 of Oklahoma City, Oklahoma, Defendant-Appellee.
U.S. Equal Employment Opportunity Commission, Amicus Curiae.

No. 09-6108. | Aug. 24, 2010.

Synopsis

Background: Former curriculum director sued school for age discrimination in demoting her to elementary school principal. The United States District Court for the Western District of Oklahoma, Robin J. Cauthron, 2009 WL 1138081, granted school summary judgment. Plaintiff appealed.

Holdings: The Court of Appeals, Lucero, Circuit Judge, held that:
[1] *McDonnell Douglas* applies to Age Discrimination in Employment Act (ADEA) claims;
[2] plaintiff suffered adverse employment action; and
[3] district court engaged in improper "pretext plus" analysis.

Reversed and remanded.

West Headnotes (8)

[1] **Civil Rights**
Practices prohibited or required in general; elements
Civil Rights
Age discrimination

To succeed on claim of age discrimination, plaintiff must prove by preponderance of evidence that her employer would not have taken challenged action but for plaintiff's age; age need not have been the only factor, rather, if there were other factors, employer may be held liable if age was the factor that made a difference. Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1).

25 Cases that cite this headnote

[2] **Civil Rights**
Age discrimination

McDonnell Douglas three-step analysis, in which plaintiff must first demonstrate prima facie case of unlawful discrimination, which shifts burden of production to employer to identify legitimate, nondiscriminatory reason for adverse employment action, which shifts burden back to plaintiff to prove employer's proffered reason was pretextual, applies to age discrimination cases under ADEA. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.
38 Cases that cite this headnote

[3] **Civil Rights**
Practices prohibited or required in general; elements

To prove prima facie case of age discrimination, plaintiff must show: (1) she is member of class protected by ADEA; (2) she suffered adverse employment action; (3) she was qualified for position at issue; and (4) she was treated less favorably than others not in protected class. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.
19 Cases that cite this headnote

[4] **Civil Rights**
Adverse actions in general

Adverse employment action, as element of prima facie case of age discrimination, is not simply limited to monetary losses in form of wages or benefits, rather court takes "case-by-case approach," examining unique factors relevant to situation at hand; although mere inconvenience or alteration of job responsibilities would not be

adverse employment action, the prong is satisfied by significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or decision causing significant change in benefits. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.
6 Cases that cite this headnote

[5] **Civil Rights**
Education, employment in

Although former curriculum director's salary was not immediately decreased when she was reassigned to position as elementary school principal, she suffered adverse employment action, as required for her age discrimination claim, where she suffered $17,000 decrease in salary the following year, her vacation benefits were reduced immediately upon reassignment, her retirement benefits were reduced the following year, and she lost professional prestige, falling to lower position in school district's organizational hierarchy. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[6] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Having established prima facie case of age discrimination and demonstrated that school district's proffered reasons for her reassignment to elementary school principal, superintendent's desire to undertake reorganization of school district's executive team in revenue-neutral fashion and his belief that director's former position contained only narrow duties that could be absorbed by other directors, were pretextual, former curriculum director was not required to produce additional evidence of discrimination in order to avoid summary judgment; former director produced evidence that her former position stayed on books for the next fiscal year and that staff in her department remained employed in same positions after her transfer, and that a new position, created shortly after her transfer, had strikingly similar job responsibilities, and district court improperly favored district's version of the facts in reasoning that director generated only weak question of fact regarding whether school district's proffered reasons were pretextual. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.
3 Cases that cite this headnote

[7] **Civil Rights**
Motive or intent; pretext

Plaintiff in employment discrimination case produces sufficient evidence of pretext when she shows such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in employer's proffered legitimate reasons for its action that reasonable factfinder could rationally find them unworthy of credence and hence infer that employer did not act for asserted non-discriminatory reasons.

18 Cases that cite this headnote

[8] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

When evaluating sufficiency of evidence of pretext, on motion for summary judgment in employment discrimination case, court looks to several factors, including strength of employee's prima facie case, probative value of proof that employer's explanation is false, and any other evidence that supports employer's case and that properly may be considered on motion for summary judgment.

6 Cases that cite this headnote

Attorneys and Law Firms

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James M. Tucker, James L. Lee, Carolyn L. Wheeler, and Vincent Blackwood filed a brief on behalf of amicus curiae, U.S. Equal Employment Opportunity Commission, in support of Appellant.

Before BRISCOE, SEYMOUR, and LUCERO, Circuit Judges.

Opinion

LUCERO, Circuit Judge.

Judy F. Jones appeals from the district court's grant of summary judgment in favor of her employer, Oklahoma City Public Schools ("OKC"), dismissing her claim of discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* Although the district court found that Jones produced sufficient evidence to establish a prima facie case of discrimination and submitted ***1275** evidence to show that OKC's proffered explanations for her demotion were pretextual, the court granted summary judgment to OKC on the ground that no reasonable juror could find that OKC had committed age discrimination. Because we conclude that the district court engaged in a "pretext plus" analysis in rendering its decision, we reverse.

I

Jones began working for OKC as a teacher in 1969. She then served as a principal of an elementary school for approximately fifteen years. In 2002, Jones was promoted to Executive Director of Curriculum and Instruction. Colleagues evaluated Jones' performance in this position as satisfactory or better. For the 2006-2007 fiscal year, Jones' negotiated salary was $98,270, with a daily pay rate of $396.25 per day.

In July 2006, Linda Brown became OKC's interim superintendent. Brown altered OKC protocol such that Jones reported first to Manny Soto and later to Linda Toure, two of OKC's five executive directors in charge of schools and support services. Over the course of the next year, both Soto and Toure asked Jones when she was going to retire. On one occasion, Brown also questioned Jones about her retirement plans.

OKC eventually hired John Porter as its permanent superintendent in spring 2007. Porter was to start full-time work in July 2007, but was employed as a consultant during the months of May and June. According to Porter, he and Brown "worked closely" during this period "to ensure a smooth transition into the position of Superintendent." After reviewing the district's organizational chart, Porter determined that OKC's executive team should be reorganized. In particular, he decided that Jones' position could be eliminated and its duties absorbed by other directors. This elimination would allow Porter to reorganize the district's administration in a budget-neutral manner. Porter directed Michael Shanahan, OKC's senior human resources officer, to notify Jones that her position would be eliminated and she would be reassigned as an elementary school principal. Brown was present during this exchange, but averred that she did not have any input into Porter's decision.

Jones met with Shanahan in early June 2007. Shanahan communicated Porter's orders and informed Jones that her salary would stay the same for the ensuing school year only.[1] Jones asked Shanahan who made the decision to demote her, and Shanahan responded that it was Brown and Porter. Shanahan subsequently stated that four other executive directors were involved in the reassignment decision. Scott Randall, OKC's senior finance officer, later told Jones that she was the only director the administration had "gone after." Randall also stated that if Porter was transferring Jones for financial or budgetary reasons, Porter would have "run" it by him.

After her reassignment and during her first year of employment as an elementary school principal, Jones retained her previous salary level. Her vacation benefits, however, were affected immediately. After Jones completed her first year as principal, her salary was decreased by approximately $17,000. This pay cut had the effect of reducing her retirement benefits. Jones' daily pay rate was also reduced by roughly five dollars per day.

One month after Jones' reassignment, Porter decided to create a new OKC executive ***1276** position, Executive Director of Teaching and Learning. The job description and responsibilities for this position were quite similar to those of Jones' former position of Executive Director of Curriculum and Instruction. Both positions required a master's degree in curriculum and instruction, and the job responsibilities for both positions included oversight of programs designed to improve teacher instruction and curricular development. OKC filled this new position with an individual who was forty-seven years of age. At the time of Jones' reassignment, she was nearly sixty years old.

In May 2008, Jones filed suit in the District Court for the Western District of Oklahoma alleging OKC violated the ADEA when it demoted her to the position of elementary school principal.[2] OKC filed a motion for summary judgment, denying that Jones was demoted and arguing, in the alternative, that if Jones had suffered an adverse employment action it was due exclusively to the elimination of her former position.

Analyzing Jones' claims under the traditional *McDonnell Douglas*[3] framework, the district court concluded that Jones had established a prima facie case of age discrimination. The court determined that Jones suffered an adverse employment action because her transfer resulted in an immediate reduction in her vacation pay, retirement benefits, and the prestige of her position. Proceeding to the next step of the *McDonnell Douglas* analysis, the district court concluded that OKC met its burden of offering legitimate, nondiscriminatory reasons for its actions: (1) Porter decided to create a new deputy superintendent position in a revenue-neutral manner; and (2) Jones' position was eliminated to fund the new position. The court held that this evidence was sufficient to shift the burden back to Jones to demonstrate that OKC's reasons for her reassignment were pretextual.

In response, Jones noted that funding for her previous position stayed on the books for the 2007-2008 fiscal year, and staff in her former department continued working in that department before and after the position of Executive Director of Teaching and Learning was created. Moreover, Jones stressed the similarities between her previous position and the new position created just after her demotion. She also stated under oath that fellow OKC directors, including Brown, made age-related comments regarding her retirement plans and that these comments occurred outside of the context of a normal course of conversation. Viewing the evidence in the light most favorable to Jones, the district court determined that a reasonable factfinder could conclude that OKC's proffered reasons for Jones' reassignment were inconsistent or unworthy of belief.

Quoting *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), however, the court reasoned: "[T]here will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." According to the district court, Jones' case fell within this exception. Her evidence for pretext was not "particularly strong" and "a reasonable juror could very ***1277** well find no inconsistencies in [OKC's] position." Although the court acknowledged that OKC leadership had made age-related comments, it faulted Jones for not providing any "additional evidence" to show that age played a role in the reassignment decision. As a result, the district court granted summary judgment in favor of OKC. This appeal followed.

II

We review a district court's grant of summary judgment de novo, applying the same legal standard used by the lower court. *McKenzie v. Dovala*, 242 F.3d 967, 969 (10th Cir.2001). Summary judgment is proper only if "there is no genuine issue as to any material fact" and "the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). "We examine the factual record and reasonable inferences therefrom in the light most favorable to [Jones], who opposed summary judgment." *Thomas v. Int'l Bus. Machs.*, 48 F.3d 478, 484 (10th Cir.1995).

A

1

Before reaching the merits of parties' arguments, we must first determine whether the Supreme Court's holding in *Gross v. FBL Financial Services, Inc.*, --- U.S. ----, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009), decided after the district court issued its summary judgment order, affects our analysis on appeal. OKC argues that *Gross* compels dismissal of Jones' claim because it requires an ADEA plaintiff to provide some evidence that her employer was motivated solely by age when making an adverse employment decision.[4]

[1] OKC's argument is flawed on several levels, but we need address only one: It conflates two separate standards for causation. The ADEA, like other anti-discrimination statutes, includes a causation requirement. It prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added). The statute, however, does not define the phrase "because of," and before *Gross*, it was unclear which causal standard applied. *Gross* clarified that the ADEA requires "but-for" causation. 129 S.Ct. at 2351. Consequently, to succeed on a claim of age discrimination, a plaintiff must prove by a preponderance of the evidence that her employer would not have taken the challenged action but for the plaintiff's age. *Id.* OKC argues that in mandating but-for causation, *Gross* established that "age must have been the only

factor" in the employer's decision-making process.

We disagree. The Tenth Circuit has long held that a plaintiff must prove but-for causation to hold an employer liable under the ADEA. *See EEOC v. Prudential Fed. Sav. & Loan Ass'n,* 763 F.2d 1166, 1170 (10th Cir.1985) (quoting *Perrell v. Financeamerica Corp.,* 726 F.2d 654, 656 (10th Cir.1984)). Moreover, we have concluded that this causal standard does "not require[ ] [plaintiffs] to show that age was the sole motivating factor in the employment decision." *Wilkerson v. Shinseki,* 606 F.3d 1256, 1266 (10th Cir.2010) (quotations omitted). Instead, an employer may be held liable under the ADEA if other factors contributed to its taking an adverse action, as long as "age was the factor that made a difference." *Id.; accord Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) ***1278** (requiring an ADEA plaintiff to show that age had a "determinative influence on the outcome" of her employer's decision-making process). *Gross* does not hold otherwise. Accordingly, *Gross* does not disturb longstanding Tenth Circuit precedent by placing a heightened evidentiary requirement on ADEA plaintiffs to prove that age was the sole cause of the adverse employment action.

2

A more nuanced question is whether *Gross* rendered the *McDonnell Douglas* framework of proving discrimination inapplicable to claims brought pursuant to the ADEA. Under *McDonnell Douglas,* a plaintiff may survive summary judgment by providing circumstantial rather than direct evidence of discrimination. *See* 411 U.S. at 802-04, 93 S.Ct. 1817. To do so, the plaintiff must first demonstrate a prima facie case of unlawful discrimination. *Id.* at 802, 93 S.Ct. 1817. If she succeeds at this first stage, the burden of production then shifts to the employer to identify a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* Once the employer advances such a reason, the burden shifts back to the plaintiff to prove the employer's proffered reason was pretextual. *See Reeves,* 530 U.S. at 143, 120 S.Ct. 2097.

[2] This circuit has long held that plaintiffs may use the *McDonnell Douglas* three-step analysis to prove age discrimination under the ADEA. *See Danville v. Reg'l Lab Corp.,* 292 F.3d 1246, 1249 (10th Cir.2002); *Ellis v. United Airlines, Inc.,* 73 F.3d 999, 1004 (10th Cir.1996). We will not overrule our prior decisions applying this framework to ADEA claims unless those decisions are in conflict with *Gross. See United States v. Edward J.,* 224 F.3d 1216, 1220 (10th Cir.2000) ("Under the doctrine of stare decisis, this panel cannot overturn the decision of another panel of this court barring en banc reconsideration, a superseding contrary Supreme Court decision, or authorization of all currently active judges on the court." (quotation and citation omitted)).

But rather than barring our use of the *McDonnell Douglas* paradigm, *Gross* expressly left open the question of "whether the evidentiary framework of [*McDonnell Douglas*], utilized in Title VII cases[,] is appropriate in the ADEA context." *Gross,* 129 S.Ct. at 2349 n. 2; *see also Reeves,* 530 U.S. at 142, 120 S.Ct. 2097 (2000) (applying *McDonnell Douglas* to an ADEA claim "[b]ecause the parties do not dispute the issue"). *Gross* accordingly does not overturn circuit precedent applying *McDonnell Douglas* to ADEA cases.

Moreover, the rule articulated in *Gross* has no logical effect on the application of *McDonnell Douglas* to age discrimination claims. *Gross* held that "the burden of persuasion [n]ever shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA." 129 S.Ct. at 2348. *McDonnell Douglas,* however, does not shift the burden of persuasion from the plaintiff to the defendant. Rather, it shifts only the burden of production. *Doebele v. Sprint/United Mgmt. Co.,* 342 F.3d 1117, 1135 (10th Cir.2003). Throughout the three-step process, "[t]he plaintiff ... carries the full burden of persuasion to show that the defendant discriminated on [an] illegal basis." *Bryant v. Farmers Ins. Exch.,* 432 F.3d 1114, 1125 (10th Cir.2005).

Although we recognize that *Gross* created some uncertainty regarding burden-shifting in the ADEA context, we conclude that it does not preclude our continued application of *McDonnell Douglas* to ADEA claims. *See Phillips v. Pepsi Bottling Group,* 373 Fed.Appx. 896, 899 (10th Cir.2010) (unpublished) ("*[Gross]* did not overrule circuit precedents in which we ***1279** have consistently employed the [*McDonnell Douglas*] burden-shifting framework in ADEA cases."). While *Phillips* is not precedential, *see* 10th Cir. R. 32.1, we agree with its reasoning and join all of our sibling circuits that have addressed this issue. *See Jackson v. Cal-Western Packaging Corp.,* 602 F.3d 374, 378 (5th Cir.2010); *Gorzynski v. Jetblue Airways Corp.,* 596 F.3d 93, 106 (2d Cir.2010); *Smith v. City of Allentown,* 589 F.3d 684, 690-91 (3d Cir.2009); *Velez v. Thermo King de Puerto Rico, Inc.,* 585 F.3d 441, 447 n. 2 (1st Cir.2009); *Geiger v. Tower Auto.,* 579 F.3d 614, 622 (6th Cir.2009); *see also Martino v. MCI Commc'ns Servs., Inc.,* 574 F.3d 447, 452 (7th Cir.2009) (applying *McDonnell Douglas* without discussion of *Gross*); *Bodkin v. Town of Strasburg,* No. 09-2167, 2010 WL 2640461, at *2 (4th Cir. June 29, 2010) (unpublished) (same).

B

[3] Having concluded that *McDonnell Douglas* applies to ADEA claims, we must now address the issue of whether Jones demonstrated a prima facie case of age discrimination. To prove a prima facie case of age discrimination, a plaintiff must show: "1) she is a member of the class protected by the [ADEA]; 2) she suffered an adverse employment action; 3) she was qualified for the position at issue; and 4) she was treated less favorably than others not in the protected class." *Sanchez v. Denver Pub. Schs.*, 164 F.3d 527, 531 (10th Cir.1998). The parties do not dispute that Jones demonstrated she was a member of the class protected by the ADEA, that she was qualified for her former position, and that she was treated less favorably than others not in the protected class.5 OKC argues, however, that Jones did not suffer an adverse employment action because she remained employed in a position with similar responsibilities and received a daily pay rate that was "almost exactly the same" as her per diem rate as an executive director.

[4] "The Tenth Circuit liberally defines the phrase 'adverse employment action.' Such actions are not simply limited to monetary losses in the form of wages or benefits. Instead, we take a 'case-by-case approach,' examining the unique factors relevant to the situation at hand." *Sanchez*, 164 F.3d at 532 (citations omitted). Although we do not deem "a mere inconvenience or an alteration of job responsibilities to be an adverse employment action," *id.* (quotation omitted), the prong is satisfied by a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," *Hillig v. Rumsfeld*, 381 F.3d 1028, 1032-33 (10th Cir.2004) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998)).

[5] Under the facts of this case, the district court correctly determined that Jones suffered an adverse employment action. Jones' reassignment letter specifically stated that her salary level would remain the same for the ensuing school year only, and Jones suffered a $17,000 decrease in salary the following year. Her vacation benefits were reduced immediately upon reassignment, and her retirement ***1280** benefits were reduced the following year. Although OKC argues that Jones did not experience a demotion, she certainly lost professional prestige and fell to a lower position in the district's organizational hierarchy. Also, OKC's argument that a five-dollar reduction in daily pay is not sufficient to constitute an adverse employment action is simply incorrect. All told, the record in this case conclusively shows that Jones suffered an adverse employment action and proved a prima facie case of age discrimination.

C

[6] We thus consider the ultimate question of whether OKC was entitled to summary judgment. Despite holding that Jones established a prima facie case of discrimination and demonstrated that OKC's proffered reasons for her reassignment were pretextual, the district court granted OKC's motion for summary judgment. It concluded that Jones' claim fell within the exception outlined in *Reeves* because, "even when the evidence is viewed in the light most favorable to [Jones], no reasonable juror could find that [OKC's] decision to reassign her was based on her age." Jones argues that this determination constitutes reversible error because the rare conditions necessary to establish the *Reeves* exception are not present in this case. We agree.

In *Reeves*, the Supreme Court rejected the so-called "pretext plus" standard that required plaintiffs using the *McDonnell Douglas* framework to both show pretext and produce "additional evidence of discrimination" in order to avoid summary judgment. *Id.* at 146-48, 120 S.Ct. 2097. *Reeves* expressly held that "a plaintiff's prima facie case [of discrimination], combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148, 120 S.Ct. 2097. No additional evidence is necessary to show discrimination because "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination." *Id.* at 147, 120 S.Ct. 2097.

[7] [8] Consistent with *Reeves*, the Tenth Circuit has "definitively rejected a 'pretext plus' standard." *Swackhammer v. Sprint/United Mgmt. Co.*, 493 F.3d 1160, 1168 (10th Cir.2007). Consequently, "once a plaintiff presents evidence sufficient to create a genuine factual dispute regarding the veracity of a defendant's nondiscriminatory reason, we presume the jury could infer that the employer acted for a discriminatory reason and must deny summary judgment." *Bryant*, 432 F.3d at 1125. A plaintiff produces sufficient evidence of pretext when she shows "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." *Jaramillo v. Colo. Judicial Dep't*, 427 F.3d 1303, 1308 (10th Cir.2005). When evaluating the sufficiency this evidence, we look to several factors, "includ[ing] the strength of the

[employee's] prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered" on a motion for summary judgment. *Reeves,* 530 U.S. at 148-49, 120 S.Ct. 2097.

OKC proffered two legitimate reasons for Jones' reassignment: Porter's desire to undertake a reorganization of OKC's executive team in a revenue-neutral fashion and his belief that Jones' former position contained only narrow duties that could be absorbed by other directors. With respect ***1281** to Porter's first goal, Jones produced evidence that her former position stayed on the books for the 2007-2008 fiscal year and that staff in her department remained employed in the same positions after her transfer. Further, Randall told Jones that if her transfer was actually motivated by budgetary reasons, Porter would have "run" it by him. Similarly, Randall attested to the fact that OKC could have easily taken Jones' former position off the books if it so desired.

Second, Jones presented evidence that a new position, Executive Director of Teaching and Learning, was created shortly after her transfer. As noted *supra,* this position's job responsibilities were strikingly similar to those of Jones' former position as Executive Director of Curriculum and Instruction. Although OKC argues that the new position entailed more responsibility, it also admits that the position reabsorbed many of the same duties of Jones' former position and was filled by someone thirteen years Jones' junior. Together, this evidence was sufficient to satisfy *McDonnell Douglas*'s third step, and the district court's grant of summary judgment was therefore improper.

In reversing the district court, we recognize that *Reeves* carved out a narrow exception to our general rule against a "pretext plus" requirement. Under *Reeves,* "there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." 530 U.S. at 148, 120 S.Ct. 2097. For example, an employer would be entitled to summary judgment "if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue *and* there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.* (emphasis added).

But the *Reeves* exception does not apply here. In reasoning that Jones generated only a weak question of fact regarding whether OKC's proffered reasons were pretextual, the district court improperly favored OKC's version of the facts. It stated, for instance, that "[o]f the persons who [inquired into Jones' retirement plans], only one, Ms. Brown, was even arguably involved in the reassignment decision, but [OKC] strongly argues she had no role in the decision process." After noting that "Brown's own testimony clearly states that the decision regarding [Jones'] reassignment was made by ... Porter," the court concluded that Jones' "lack of evidence from which a reasonable jury could find discrimination ... place[d][her] case squarely within the contours of the *Reeves* exception."

However, the district court was required to view the facts in the light most favorable to Jones. *See Thomas,* 48 F.3d at 484. Accordingly, it should have credited Shanahan's statement that four other directors were involved in the decision to reassign Jones. Properly considered at the summary judgment stage, Jones' evidence of discrimination therefore included age-related comments by three executive directors, all involved in the reassignment decision.6 Finally, even if we were to assume ***1282** that Jones "created only a weak issue of fact as to whether [OKC's] reason was untrue," the corollary "abundant and uncontroverted independent evidence that no discrimination had occurred" did not exist in this record. *Reeves,* 530 U.S. at 148, 120 S.Ct. 2097.

Rather than properly applying *Reeves,* the district court erroneously held Jones to the discredited "pretext plus" standard. The court faulted Jones for not presenting "additional evidence" that age was a determining factor in her reassignment. But after showing that OKC's reasons for her transfer were pretextual, Jones was under no obligation to provide additional evidence of age discrimination. *See Reeves,* 530 U.S. at 147, 120 S.Ct. 2097; *accord Swackhammer,* 493 F.3d at 1168. Accordingly, because we agree with Jones that the rare conditions necessary to satisfy the *Reeves* exception are not present, we **REVERSE** the district court's grant of summary judgment and **REMAND** for further proceedings.

Parallel Citations

110 Fair Empl.Prac.Cas. (BNA) 4, 93 Empl. Prac. Dec. P 43,967, 260 Ed. Law Rep. 541

Footnotes

1 Shanahan also told Jones that she could apply for other open positions. Jones declined to apply for these positions because doing so

would require her to apply to "the very people" who made the decision to eliminate her former position.

2 Jones also alleged wrongful discharge in violation of the Oklahoma Anti-Discrimination Act, Okla. Stat. tit. 25, § 1101, *et seq.*, but conceded below that this claim should be dismissed.

3 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). As discussed *infra*, *McDonnell Douglas* allows plaintiffs to prove age discrimination using a three-step, burden-shifting method of proof.

4 "Although this argument was not raised below, inasmuch as [*Gross*] was decided after [Jones] filed her notice of appeal, we may consider changes in governing law arising during the pendency of the appeal." *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1222 (10th Cir.1996).

5 OKC does obliquely reference the "undisputed" fact that, during his tenure as superintendent, Porter promoted and employed several persons over the age of forty. However, OKC makes this reference in an effort to counter Jones' assertions that she was demoted. OKC does not debate Jones' ability to satisfy the fourth factor of the prima facie test and has therefore has waived any argument to that effect. *See Jordan v. Bowen*, 808 F.2d 733, 736 (10th Cir.1987) ("[Parties] who fail to argue [an] issue in their brief are deemed to have waived [that] contention on appeal.").

6 At the time of the decision to transfer Jones, OKC employed five executive directors (including Jones). Two of these directors had made comments concerning Jones' retirement plans: Linda Toure and DeAnn Davis. As previously noted, Toure questioned Jones at least once about when she was going to retire. Also, Davis asked Jones on two occasions when she was going to retire. A witness to one of these occasions interpreted Davis' questions as "indicating that things would be better if Dr. Jones would go ahead and retire and that she really ought to consider retiring."

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217 F.3d 1104
United States Court of Appeals, Ninth Circuit.

Aybike KORTAN, Plaintiff-Appellant,
v.
CALIFORNIA YOUTH AUTHORITY; Albert Atesalp; I.R. Schulman; Manual Carbajal, Defendants-Appellees.

No. 98-56047. | Argued and Submitted Feb. 8, 2000 | Filed July 7, 2000

State employee, a Caucasian female, brought Title VII action against employer alleging racial and sexual harassment and retaliation. The United States District Court for the Central District of California, Edward Rafeedie, J., 5 F.Supp.2d 843, entered summary judgment for employer. Employee appealed. The Court of Appeals, Rymer, Circuit Judge, held that: (1) court would consider evidence of supervisor's actions occurring prior to date referenced in employee's complaint, deposition, and Equal Employment Opportunity Commission (EEOC) charge as being the onset date of allegedly harassing incidents; (2) though supervisor's sexually-related comments about women were offensive, conduct was not frequent, severe, or abusive enough to interfere unreasonably with plaintiff's employment, as required for Title VII sexual harassment claim; and (3) employee failed to support Title VII retaliation claim.

Affirmed.

Fisher, Circuit Judge, filed opinion dissenting in part.

West Headnotes (11)

[1] **Civil Rights**
Admissibility of Evidence; Statistical Evidence

With respect to employee's hostile work environment claim, court would consider evidence of supervisor's actions occurring during the four to five months prior to date referenced in employee's complaint, deposition, and Equal Employment Opportunity Commission (EEOC) charge as being the onset date of allegedly harassing incidents, as relevant background evidence to put timely claims in context. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
1 Cases that cite this headnote

[2] **Civil Rights**
Hostile Environment; Severity, Pervasiveness, and Frequency

Title VII is violated if sexual harassment is so severe or pervasive as to create a hostile work environment. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

25 Cases that cite this headnote

[3] **Civil Rights**
Hostile Environment; Severity, Pervasiveness, and Frequency

Employer is liable under Title VII for conduct giving rise to a hostile environment where employee proves (1) that he was subjected to verbal or physical conduct of a harassing nature, (2) that this conduct was unwelcome, and (3) that the conduct was sufficiently severe or pervasive to alter conditions of victim's employment and create abusive working environment, but conduct must be extreme to amount to a change in the terms and conditions of employment. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

50 Cases that cite this headnote

[4] **Civil Rights**
Hostile Environment; Severity, Pervasiveness, and Frequency

To be actionable under Title VII, sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. Civil Rights Act of 1964, § 703(a)(1), 42

U.S.C.A. § 2000e-2(a)(1).

9 Cases that cite this headnote

[5] **Civil Rights**
Sex Discrimination

Harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex, in violation of Title VII, and the motivation can be a general hostility to the presence of women in the workplace. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

5 Cases that cite this headnote

[6] **Civil Rights**
Hostile Environment; Severity, Pervasiveness, and Frequency

In considering sexual harassment claim, courts are to determine whether an environment is sufficiently hostile or abusive by looking at all the circumstances, including frequency of discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with employee's work performance. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

47 Cases that cite this headnote

[7] **Civil Rights**
Hostile Environment; Severity, Pervasiveness, and Frequency

Though supervisor's sexually-related comments about women were offensive, conduct was not frequent, severe, or abusive enough to interfere unreasonably with plaintiff's employment, as required for Title VII sexual harassment claim, where offensive conduct was concentrated on one occasion, it occurred in the wake of a dispute about a nurse's failure to follow instructions and plaintiff's telling supervisor that she would no longer serve as "acting senior psychologist" in his absence, and supervisor's comments were about other people. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

84 Cases that cite this headnote

[8] **Civil Rights**
Particular Cases
Civil Rights
Retaliation Claims

Former employee could not support Title VII retaliation claim based on allegations that supervisor stood outside her door and laughed, saying "she got me on sexual harassment charges," that supervisor ridiculed her to other employees, falsely accused her of not submitting a work order, and was hypercritical, and that she was forced to take medical leave because of the stress of retaliatory actions; laughing incident did not permit inference that supervisor's conduct would continue without sanction or that employee had no choice but to quit, and there was no evidence that other alleged conduct actually occurred. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

6 Cases that cite this headnote

[9] **Civil Rights**
Practices Prohibited or Required in General; Elements

To make out prima facie case of retaliation under Title VII, plaintiff must establish that she acted to protect her Title VII rights, that an adverse employment action was thereafter taken against her, and that a causal link exists between those two events. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

13 Cases that cite this headnote

[10] **Civil Rights**

Particular Cases

Former medical clinic employee could not support Title VII retaliation claim based on allegations that supervisor gave employee lower performance evaluations after employee accused supervisor of sexual harassment, where assistant superintendent of clinic raised the three low marks that supervisor had given, supervisor's evaluation was not disseminated beyond assistant superintendent, who corrected it, assistant superintendent's evaluation was not sub-average, nor did employee ascribe any retaliatory motive to it, and employee was not demoted, stripped of work responsibilities, fired or suspended, or otherwise treated adversely. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

33 Cases that cite this headnote

[11] **Civil Rights**
Practices Prohibited or Required in General; Elements

To establish a prima facie case of employment discrimination based on sex, employee was required to show that she was a member of a protected group (females), that she was adequately performing her job, and that she suffered an adverse employment action, or was treated differently from others similarly situated. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

30 Cases that cite this headnote

Attorneys and Law Firms

***1106** Peter R. Dion-Kindem, Los Angeles, California, for the plaintiff-appellant.

David M. Tiede, Deputy Attorney General, San Diego, California, for the defendants-appellees.

Appeal from the United States District Court for the Central District of California Edward Rafeedie, District Judge, Presiding. D.C. No. CV-96-08518-ER
Before: RYMER and FISHER, Circuit Judges, and GEORGE, Senior District Judge.*

Opinion

RYMER, Circuit Judge:

Aybike Kortan, a Clinical Staff Psychologist for the State of California Department of Youth Authority (CYA), appeals the summary judgment entered in CYA's favor on her action under 42 U.S.C. § 2000e alleging hostile work environment, retaliation, and gender discrimination. In a published opinion, the district court declined to consider evidence of harassment not mentioned in the complaint or in Kortan's charge with the California Department of Fair Employment and Housing; and held that a negative evaluation (after Kortan complained about her supervisor's conduct), unaccompanied by any other adverse impact such as a demotion or change of responsibilities, is insufficient to allow a retaliation claim to go forward. *Kortan v. State of California,* 5 F.Supp.2d 843 (C.D.Cal.1998). While an opinion published after the district court's decision, *Anderson v. Reno,* 190 F.3d 930 (9th Cir.1999), indicates that evidence outside the limitations period should be considered at least as relevant background, it does not affect the result here. As we otherwise agree that no triable issues are raised, we affirm.

I

Kortan, who is a Caucasion female, began working at the Southern Youth Reception Center and Clinic (SYCC) in June 1988 as a Clinical Staff Psychologist. On June 29, 1989, her supervisor, Dr. Albert Atesalp, appointed Kortan as "acting senior psychologist" with the authority to act on his behalf in his absence. This was a special designation for which Kortan received no extra remuneration or benefits. On January 26, 1994, she was honored as Outstanding Employee of the Year. Kortan had no complaints about Atesalp's behavior until February 1994.
On February 1, she left instructions with the nursing staff that a ward who had been admitted to the hospital was not to be discharged back into the general population without her approval, but the next day discovered that her instructions had been torn up and the ward had been returned. Kortan believed that Nurse Chavez was responsible and reported this to Atesalp. Atesalp did not seem to Kortan to take her problem seriously. On February 3, Kortan wrote Atesalp that she no longer wanted to be "acting senior" in his absence, stating that "for the past 5 years, I have been acting in your capacity when you are absent. I have been trying to do my best. However, regardless of how much I try, I am unable to improve in any way how things are around here." Over coffee after

Atesalp received the memo, Kortan says that he referred to one female, who was ***1107** formerly a superintendent of the SRCC, as a "regina," and said that this person "laughs like a hyena." He also referred to a former assistant superintendent as a "madonna," "regina" and a "castrating bitch." In the same conversation, Atesalp referred to women generally as "bitches" and "histrionics."[2]

Sometime between February 3 and 10, Kortan complained about Atesalp's conduct to Assistant Superintendent Schulman. He seemed empathetic and encouraged Kortan to "take him [Atesalp] on." Kortan then complained to Superintendent Manual Carbajal and memorialized her charges against Atesalp in a February 10, 1994 memorandum. The memorandum details a number of difficulties, including the incident with Nurse Chavez; complaints from other psychologists that Atesalp pressured them to write reports; being called to Atesalp's office to listen to a tape by Dr. Abrams (a male psychologist on staff) whose language was shocking to Kortan and later, to read a letter Atesalp had written to Abrams that used the phrase "masturbate yourself"; and Atesalp's referring to a former Superintendent as "regina," and making racial remarks about blacks. The Office of the Superintendent forwarded Kortan's complaints together with a request for investigation to the Headquarters of the California Youth Authority in Sacramento. Brian Rivera of Internal Affairs was assigned to investigate.

After Kortan complained about Atesalp, he started to give her "the looks" and to stare at her instead of smiling, as he had before. Atesalp told Kortan that "All this time, I assumed you were 'Artemis' ... I made a mistake, and you are not 'Artemis.' You are 'Medea.' " She also heard him laughing outside her door, saying "Yeah, she got me on sexual harassment charges. Ha. Ha."

Meanwhile, Kortan was concerned about having an upcoming evaluation conducted by Atesalp. She asked that her supervision be transferred from Atesalp to Dr. Pastrana, the Senior Psychologist of the Marshall program. However, that program was separate from the diagnostic program in which Kortan was working and was fully staffed with clinical psychologists at the time. Consequently, Atesalp did the evaluation. He rated Kortan's performance as "E" ("performance consistently exceeds expected standards") in five of the eight areas of evaluation and "I" ("improvement needed to meet expected standards") in three areas: work habits, relationships with people, and meeting work commitments. These were the lowest overall evaluations Kortan had received, although she had received an "M" ("performance fully meets expected standards") in the "work habits" section on her 1989 evaluation. To avoid any perception of retaliation, Schulman independently reviewed Atesalp's evaluation of Kortan; because he did not believe that Atesalp's initial evaluation was completely accurate, and felt there was retaliation, he changed the three low ratings to "M." He explained that he could not give Kortan higher ratings because she had been on vacation or leave for a significant part of the evaluation period (between May and August 1993), and the maintenance staff had complained about how she treated them. Both Kortan and Atesalp refused to sign the evaluation. Only Schulman's evaluation (signed April 26) ended up in Kortan's personnel file.

On March 11 Schulman instructed Atesalp to conduct business with Kortan so there could be no perception of retaliation or harassment. On March 22, after reviewing Atesalp's initial performance evaluation, Schulman told him to stop any type of behavior that might be perceived as retaliatory or harassing. He also forwarded ***1108** information about Atesalp's possibly retaliatory conduct to Rivera.

Kortan asked Schulman for a temporary transfer to the Ventura facilty, but Schulman had no discretion to effect such a transfer. When Kortan inquired of Vivian Crawford, the Superintendent of the Ventura facility, regarding a position, she was told there was none available but that her letter would be kept on file. Kortan also indicated to Rivera that she would like to change offices, as hers was located next to Atesalp's. Alternatives were discussed with her and her office was eventually moved in September.

Rivera completed his report May 7, 1994; he found the charges of harassment in Kortan's February 10 memorandum unsubstantiated. Kortan was advised of CYA's conclusion that there was no evidence of sexual harassment on October 5, 1994. Her last day of work was October 24, and she was hospitalized the next day. Since then, Kortan has been on leave of absence.

Kortan filed charges with the EEOC on October 31, 1994. She claimed that starting February 2, 1994, Atesalp created a hostile work environment by using racist and sexist terminology, and that after complaining about his conduct she was given a lowered performance rating, had a temporary transfer request denied, and had been threatened with disciplinary action if she spoke about the allegations. She received a right to sue letter in September 1996, and filed this action December 6, 1996.

CYA moved for summary judgment, which the district court granted. Kortan timely appeals.

II

Kortan makes two arguments with respect to her hostile work environment claim. First, she argues that there is a triable issue as to the existence of a hostile work environment; and second, she asserts that the district court's decision to grant summary judgment was based in large part on its decision not to consider evidence of Atesalp's actions occurring during the four to five months prior to February 3, 1994.

A

[1] The pre-February 3, 1994 evidence Kortan proffered consists of her declaration that beginning in late 1993 and continuing into 1994, Atesalp used gender derogatory language in her presence, including referring to various staff members as a "castrating bitch," "Madonna," and "regina."[3] Kortan also states that Atesalp referred to her as "Rapunzel" and "Medea" and wrote postcards to her at home. Asked at her deposition about Atesalp's use of terms such as "Madonna" or "castrating bitch," Kortan indicated that prior to February 3, 1994 he did so "[v]ery infrequently," "[p]robably once or twice" in the case of the term "castrating bitch." Also, once, in talking about his license, he described a woman who interviewed him as "histrionic."

The district court did not consider this evidence because Kortan expressly limited the onset of the allegedly harassing incidents to February 1994 in her complaint, her EEOC charges,[4] and her deposition. ***1109** [5] Kortan submits that this was wrong under our opinion in *EEOC v. Farmer Bros.*, 31 F.3d 891, 899 (9th Cir.1994), because Atesalp's prior actions were "like and reasonably related" to her allegations of harassment occurring after February 3, 1994, and would have been within the scope of a reasonably thorough EEOC investigation.

In *Farmer,* the employer decided to reduce the number of women employed in production jobs and to accomplish this by a gender neutral lay-off followed by rehires that would be mostly male. The plaintiff raised a discriminatory layoff claim in her federal complaint, which Farmer Bros. sought to have dismissed for failure to exhaust administrative remedies on the ground that she had not included the layoff claim (as compared with a failure to rehire claim) in the charges filed with the EEOC. In that context we stated that the district court had subject matter jurisdiction over the lay-off claim if that claim fell within the scope of the EEOC's *actual* investigation or an " 'EEOC' investigation which *can reasonably be expected* to grow out of the charge of discrimination.' " *Id.* at 899 (quoting *Sosa v. Hiraoka,* 920 F.2d 1451, 1456 (9th Cir.1990)). We went on to note that Farmer *had* included her claim of discriminatory lay-off in her EEOC charge, but even if she hadn't, it was "*necessary* for the EEOC to investigate the circumstances of [plaintiff's] layoff" in order to understand the failure to rehire. *Id.* Therefore, we held that the district court correctly exercised jurisdiction over the layoff claim. Unlike *Farmer,* here it was not "*necessary* " for the EEOC to investigate pre-February 1994 events in order to evaluate the claim Kortan actually made-that Atesalp's comments beginning in February created a hostile work environment-nor had it done so, would the investigation have revealed anything probative except for the same comments "very infrequently" made.

However, after the district court rendered its decision in this case, we addressed a somewhat similar situation in *Anderson v. Reno,* 190 F.3d 930 (9th Cir.1999). Anderson was a veteran of the FBI who brought a Title VII action alleging sexual harassment occurring over many years. In granting summary judgment on her claim of a hostile work environment, the district court declined to consider any incident that did not occur within the statutory limitations period before the EEOC proceedings were brought. We held that the excluded incidents were part of a pattern of alleged discrimination that continued within the statutory period, and that regardless of whether "actionable in and of themselves, untimely claims serve as relevant background evidence to put timely claims in context." *Id.* at 936. Therefore, we shall consider the evidence to which Kortan points that occurred four to five months prior to February 3, 1994.

B

[2] [3] [4] [5] Under Title VII, it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII is violated if sexual harassment is so severe or pervasive as to create a hostile work environment. *See Montero v. AGCO Corp.,* 192 F.3d 856, 860 (9th Cir.1999); *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 118 S.Ct. 998, 1001, 140 L.Ed.2d 201 (1998). "An employer is liable under Title VII for conduct giving rise to a hostile ***1110** environment where the employee proves (1) that he was subjected to verbal or physical conduct of a harassing nature, (2) that this conduct was unwelcome, and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Pavon v. Swift Trans. Co., Inc.,* 192 F.3d 902, 908 (9th Cir.1999). " 'Conduct must be extreme to

amount to a change in the terms and conditions of employment.' To be actionable under Title VII, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' " *Montero,* 192 F.3d at 860 (quoting *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, 2284, 2283, 141 L.Ed.2d 662 (1998)). "[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *Oncale,* 118 S.Ct. at 1002. The motivation can be a "general hostility to the presence of women in the workplace." *Id.*
[6] Courts are to determine whether an environment is sufficiently hostile or abusive by " 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " *Faragher,* 118 S.Ct. at 2283 (quoting *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)).6

[7] There is no question that Atesalp's comments were offensive. The difficulty is that they were mainly made in a flurry on February 3rd. Once or twice before he had referred to a former female superintendent as a "castrating bitch" or "madonna" or "regina," but Kortan did not regard this as harassing and she thought Atesalp behaved like a "perfect gentleman" prior to February 3. He used "regina" again on February 9. As unpleasant as Atesalp's outburst was, the comments were about other people. He never directed a sexual insult at Kortan. He also told her, on or after February 3, that she wasn't Artemis as he had previously thought but Medea. Even so, Atesalp's utterances were just offensive. *See Meritor Savings Bank v. Vinson,* 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (mere utterance of epithet which engenders offensive feelings would not affect conditions of employment to sufficiently significant degree necessary for violation of Title VII).

Kortan argues that whether a reasonable woman would have found Atesalp's action hostile or abusive was an issue of fact for the jury to decide. She points to *EEOC v. Hacienda Hotel,* 881 F.2d 1504 (9th Cir.1989), where we affirmed the district court's findings and conclusions following a bench trial that repeated vulgarities, sexual remarks, and requests for sexual favors by a hotel employee subjected female maids to severe and pervasive sexual harassment that seriously tainted the working environment and altered the terms and conditions of their employment. Among other things, the chief of engineering (Nusbaum) told a pregnant maid "that's what you get for sleeping without your underwear," asked her why she was pregnant by another man, and made comments about her "ass." Nusbaum regularly offered to give another maid money and an apartment to live in if she would "give him [her] body"; he assured her she would never be fired if she would have sex with him; and he told another ***1111** "You have such a fine ass. It's a nice ass to stick a nice dick into. How many dicks have you eaten?" The evidence also showed that the Executive Housekeeper merely laughed at such remarks and herself called one of the maids a "dog," "whore" and "slut."

However offensive his language, Altesalp's conduct is not so severe or pervasive as Nusbaum's in *Hacienda Hotel.* Although Kortan urges that improper conduct does not have to rise to the level of that present in *Hacienda Hotel* to be actionable, other cases in which a hostile work environment has been found to exist are also quite different. *Anderson* is a good example. Anderson was an FBI agent who "endured a host of sexually harassing incidents between 1986 and 1994," including being referred to by her supervisor as the "office sex goddess," "sexy," "gorgeous," and "the good little girl" instead of by name; at a presentation she was to make about an arrest plan, finding an easel with a drawing of a pair of breasts and the words, "Operation Cupcake," and being told by the supervisor in front of the assembled group "This is your training bra session"; receiving various vulgar notes including a cartoon depicting varieties of female breasts with her initials next to an example labeled "cranberries"; and being patted on the buttocks by another agent, who commented on her "putting on weight down there" and informed Anderson of his observations from time to time.

In *Draper v. Coeur Rochester, Inc.,* 147 F.3d 1104 (9th Cir.1998), a female employee of a mining company alleged that over a two-year period her supervisor made sexual remarks about her, in and out of her presence; frequently called her "beautiful" and "gorgeous" rather than her name; told her about his sexual fantasies, including his desire to have sex with her as well as his wife; joked that the answer to a riddle about what a Mexican prostitute was called is "frijole"; several times remarked about Draper's "ass" and commented to others that "it would be fun to get into [Draper's] pants"; and on one occasion used the loudspeaker to ask whether she needed help changing clothes and said there were several guys willing to help, and on another, after Draper had taken off a sweatshirt, to ask whether that was all she was going to take off.

Montero further illustrates the type of conduct that gives rise to a hostile working environment. Montero was the only female employee at a parts distribution center. Over a two-year period, one supervisor called her a "butt-kiss," told Montero he was going to spank her, rested his chin on her shoulder, grabbed her arms until she said "ouch," and

made crude gestures. Another supervisor grabbed his crotch while speaking with her, placed his face on her bottom, told her he had sexual dreams about her, put his hand on her chair as she sat down, tried to bite her neck, and knelt in front of her and tried to put his head between her knees. Another employee had pulled her pants up from behind by the belt loop, commented about the small size of his penis, and placed notes on her desk telling Montero to dance naked on the desk or to take off her clothes.

The conduct in this case is simply not of this order of magnitude. Considering all the circumstances, including the fact that Atesalp's offensive conduct was concentrated on one occasion, and that it occurred in the wake of a dispute about a nurse's failure to follow instructions and Kortan's telling Atesalp that she would no longer serve as "acting senior psychologist" in his absence, we conclude that no triable issue exists about whether the conduct was frequent, severe or abusive enough to interfere unreasonably with Kortan's employment.

III

[8] [9] Kortan next argues that the district court ignored retaliatory actions that were taken after she complained about Atesalp's conduct, and that it applied an incorrect legal standard in determining ***1112** whether she had been the subject of an "adverse employment decision." To make out a prima facie case of retaliation, Kortan must establish "that she acted to protect her Title VII rights, that an adverse employment action was thereafter taken against her, and that a causal link exists between those two events." *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir.1994).

Kortan identifies the following as adverse employment actions:

- Atesalp's laughing and stating that Kortan "got him on sexual harassment charges";
- Atesalp's ridiculing Kortan to other employees;
- Atesalp's hostile stares;
- Atesalp's calling Kortan "Medea";
- Atesalp's falsely accusing Kortan of not submitting a work order to have her desk repaired;
- Atesalp's increased criticism of Kortan;
- Atesalp's low ratings of Kortan's performance in three categories whereas before her complaints, she had been Outstanding Employee of the Year;
- CYA's failure to respond to Kortan's requests for transfer and a different office;
- CYA's failure to investigate complaints about retaliation;
- Shulman telling her on October 24, 1994 to communicate with him rather than with CYA headquarters about complaints, and Atesalp yelling at her during the meeting;
- Constructively discharging her.

Of these, Kortan contends that being forced to take medical leave because of the stress of retaliatory actions is the most obviously "adverse" employment decision. She analogizes to *Draper,* where a woman employee who had been subjected to extreme harassment by a supervisor and had complained to management, confronted him months later about continuing harassment and was met with a response that included telling his direct supervisor that Draper was in his office "digging up old bones" and laughing. From this she could reasonably conclude that nothing was going to be done to stop the conduct. Kortan views evidence that Atesalp stood outside her door and laughed, saying "she got me on sexual harassment charges" as similar; however, unlike *Draper,* Atesalp's response was his own immediate-albeit inappropriate-reaction to her complaint. From this, it is not possible to infer either that Atesalp's conduct would continue without sanction or that Kortan had no choice but to quit. Nor can we say that the combination of incidents after Kortan lodged her complaint February 10 were such that a "reasonable person would feel that the conditions of employment have become intolerable." *Draper,* 147 F.3d at 1110. Although she claims that Atesalp ridiculed her to other employees, falsely accused her of not submitting a work order, and was hypercritical, there is no evidence showing that these things happened. Thus, at most he was less civil, stared at her in a hostile fashion, and became more critical of her performance.

[10] This leaves Kortan's evaluation by Atesalp, which appraised her work as "exceeds expected standards" in five categories but was lower than average in three-and was admittedly retaliatory. However, Schulman raised the three low marks that Atesalp had given to "performance fully meets expected standards." Thus, the evaluation in Kortan's file shows that she exceeded expected standards in most categories and fully met them in the others. Kortan does not ascribe any retaliatory motive to Schulman's evaluation, which is the one that counts.

Kortan maintains that she should not be expected to show a tangible injury, relying on *Hashimoto v. Dalton,* 118 F.3d 671 (9th Cir.1997), and *Yartzoff v. Thomas,* 809 F.2d 1371 (9th Cir.1987). In *Hashimoto,* an Asian-American woman alleged that ***1113** the Department of Navy gave her a negative job reference in retaliation for filing an EEO complaint. We recognized that unlike most cases alleging retaliation where the retaliatory conduct takes the form of discharge, demotion, failure to promote, or the like, a retaliatory negative job reference does not itself inflict tangible employment harm because it requires a prospective employer's subsequent, adverse action in response to the reference to create the employment harm. Accordingly, we held that disseminating a negative job reference is a personnel action that violates Title VII even if it does not affect a decision not to hire the victim. In *Yartzoff,* an employee at an EPA research laboratory alleged that the Agency made a number of adverse employment decisions because of his pursuit of Title VII grievances in May 1979. Among them were the transfer of various job duties between August 1979 and February 1980, the issuance of a sub-average performance rating in April 1980, and the transfer of additional job duties in February 1981. We stated that "[t]ransfers of job duties and undeserved performance ratings, if proven, would constitute 'adverse employment decisions' cognizable under this section." *Yartzoff,* 809 F.2d at 1376. However, neither *Hashimoto* nor *Yartzoff* rescues Kortan's claim based on *Atesalp* 's negative evaluation. The *Atesalp* evaluation was not disseminated beyond Schulman, who corrected it; and the *Schulman* evaluation was not sub-average or undeserved to the extent it was less than perfect in three of eight categories. Beyond this, Kortan was not demoted, was not stripped of work responsibilities, was not handed different or more burdensome work responsibilities, was not fired or suspended, was not denied any raises, and was not reduced in salary or in any other benefit. Thus, Kortan has not shown that her evaluation was discriminatory or retaliatory, or was such an "intolerable" act that it would force an employee to quit. *See Steiner,* 25 F.3d at 1466 (evaluation characterizing plaintiff as "acceptable" is not "intolerable"). *Compare Sanchez v. City of Santa Ana,* 915 F.2d 424, 431 (9th Cir.1990) (unfounded negative evaluations that led to denial of merit pay in evaluation constituted constructive discharge).

IV

[11] Finally, Kortan argues that a triable issue of fact exists whether she was discriminated against because of her sex. In order to establish a prima facie case of employment discrimination, Kortan must show that she was a member of a protected group (females); that she was adequately performing her job; and that she suffered an adverse employment action, or was treated differently from others similarly situated. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The district court properly dismissed this claim because, for reasons we have already explained, Kortan failed to show an adverse employment action.

AFFIRMED.

FISHER, Circuit Judge, dissenting in part:

I respectfully dissent from the majority's conclusion that Aybike Kortan failed to raise genuine issues of material fact regarding her retaliation and hostile working environment claims. Admittedly, this is a close case, and there is an attraction to the majority's resolution in not setting the bar for Title VII claims so low as to encourage litigation over commonplace, although objectionable, behavior in the workplace. Nonetheless, I believe that, given the particular circumstances here and that this is a ruling on summary judgment where the close call should go to the plaintiff, Kortan has met her burden for both claims and should be allowed to proceed to trial on the merits.

The significant aspect of this case that causes me to differ with the majority is the overt retaliation against Kortan by her supervisor, Atesalp-conduct that elevates ***1114** this case from a misogynist's rantings against his female colleagues into a hostile work environment for this individual subordinate. For this supervisor did more than demean with words; he used his superior position to punish Kortan with a dramatically lowered and undeserved performance evaluation that even Atesalp's supervisor, Schulman, recognized as retaliation for Kortan's complaints against Atesalp. The majority, I fear, diminishes the true nature of the hostile work environment Kortan faced by isolating the retaliatory performance review from its analysis of the work environment, notwithstanding that retaliation was a critical aspect of the totality of the circumstances we are bound to consider. *See Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) ("[W]hether an environment is 'hostile' or 'abusive' can only be determined by looking at all the circumstances."); *see also Drake v. Minnesota Mining & Mfg. Co.,* 134 F.3d 878, 886 (7th Cir.1998) ("[R]etaliation can take the form of a hostile work environment."). Although Schulman took some steps to ameliorate Atesalp's retaliatory review, Atesalp-on the undisputed record before us-remained recalcitrant and unrepentant, suffered no reprimand other than a

memorandum directing him to avoid the perception of retaliation or harassment and retained his supervisory authority over Kortan. I believe Atesalp's offensive and demeaning outbursts, his humiliating treatment of Kortan and-most significantly-the undeserved, retaliatory performance review comprise a totality of circumstances sufficient to withstand summary judgment on Kortan's hostile work environment claim.

Moreover, even Schulman's revised evaluation largely relied upon Atesalp's tainted evaluation and left Kortan with the lowest performance rating of her career with the California Youth Authority ("C.Y.A.") notwithstanding her having just been awarded "Outstanding Employee of the Year" for the same time period. Thus, I believe Kortan has also raised a triable issue that even Schulman's evaluation was impermissibly tainted by retaliation.

I. HOSTILE WORK ENVIRONMENT: THE TOTALITY OF THE CIRCUMSTANCES

The record, construed favorably to Kortan, reasonably shows the following circumstances that turned Kortan's work environment into one of gender-based hostility. Until February 1994, Kortan and Atesalp-her immediate supervisor-enjoyed a relatively congenial professional relationship in a close-knit work environment. They interacted frequently to coordinate responsibility given Kortan's special designation as acting senior psychologist in Atesalp's absence, and Atesalp occasionally turned to her as a confidant. As Kortan testified in her deposition, however, this relationship made her "a captive audience" for Atesalp's sexist remarks-and ultimately captive to his retaliation as well. Kortan on several occasions had to listen as Atesalp unburdened himself of his offensive and demeaning attitudes toward women, with particular invective for certain women who were superintendents at C.Y.A.[1] These sexist, hostile statements about others are relevant to show Kortan was subjected to a hostile work environment. *See Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 80, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) ***1115** (concluding that actionable hostile work environment includes "general hostility to the presence of women in the workplace"); *Heyne v. Caruso*, 69 F.3d 1475, 1480 (9th Cir.1995) (concluding that "conduct tending to demonstrate hostility towards a certain group" is relevant to show discrimination against an employee who is a member of that group). Most offensive in Atesalp's misogynistic vocabulary was his use of certain terms to label women he held in highest contempt: "castrating bitch" and "regina," a term he let Kortan know was a double-entendre for vagina.[2] The term "regina" is not the gutter language other cases have condemned, but given its intended meaning is just as offensive to women. *See Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1461, 1463 (9th Cir.1994) (relying on supervisor's references to women in a "derogatory fashion using sexually explicit and offensive terms," such as "dumb fucking broads" and "cunt" as evidence he created a hostile work environment); *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 964-65 (8th Cir.1993) (concluding that such "vulgar and offensive" words " 'are widely recognized as not only improper, but as intensely degrading' " and thus frequent use of such words "clearly violates Title VII" (quoting *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir.1983))); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir.1990) (holding that "pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may serve as evidence of a hostile work environment"). Although Kortan for a time tolerated Atesalp's derogatory statements about other women, and acknowledges that as to her personally Atesalp was "a perfect gentleman," his offensive references bothered her and she objected to his use of them. Nonetheless, during the four to five month period before February 1994, Atesalp's verbal attacks on women "got worse and worse" and eventually contributed to her February 3 decision to step down from her role as acting senior psychologist.[3]

At that point, Atesalp's attitude toward Kortan plainly shifted and became hostile. In a particularly emotional outburst, Atesalp directed invective at other female colleagues and females in general that, in context, Kortan could and did reasonably understand now included her-including relegating her to the despised "regina" category. Had that been the end of it-the emotional outburst of a supervisor who felt his trusted subordinate had unfairly abandoned him-there would not be cause for invoking Title VII. But that was not the end of it. Atesalp persisted in his retaliation, committing acts of increasing severity which transform this case from mere offensive conduct into a valid hostile work environment claim.

Atesalp publicly directed his scorn against Kortan and made mockery of her sexual harassment charge outside the door of her office. Such humiliating conduct is an important factor in determining whether an employee was subjected to a hostile or abusive work environment. *See Harris*, 510 U.S. at 23, 114 S.Ct. 367. Kortan also presented evidence, which on summary judgment we must construe in her favor, that Atesalp retaliated by purposely scheduling Kortan's performance evaluation on the day Kortan was to meet with the C.Y.A.'s internal investigator and falsely accusing Kortan of not submitting a work order. Atesalp also stared and glared at her and became hypercritical of her work-prompting Schulman to admonish Atesalp to behave himself in a March 11 memorandum suggesting Atesalp was harassing ***1116** Kortan and retaliating against her through "excessive

corrections on Psychological evaluations, lack of flexibility of work hours, and documentation for minor behavior irritants."[4]

Atesalp did not back off, however. Instead he invoked his supervisory authority to retaliate against Kortan-using her annual performance review to send an unmistakable message of retribution. Thus Kortan, who had a five-year record of receiving the highest ("E") rating in all performance categories (with the exception of one "M"-an average rating-in one category in her first year), and who was awarded "Outstanding Employee of the Year" for 1993 (the evaluation period in question), dropped two levels in three categories to the substandard "I" rating in Atesalp's evaluation. Those ratings were admittedly retaliatory, as the majority recognizes.

Although Schulman partially revised Atesalp's evaluation, those revisions neither negated the hostility of the work environment nor defeat Kortan's retaliation claim. In sum, C.Y.A. management effectively ratified Atesalp's retaliation, and added to the hostility of the work environment, by failing to take any disciplinary action against him. Not surprisingly, Atesalp remained recalcitrant and refused to sign the upgraded evaluation. As the Supreme Court has observed, management's knowledge of sexual harassment and failure to take any disciplinary action "may be seen as ... the employer's adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy." *Faragher,* 524 U.S. at 789, 118 S.Ct. 2275; *accord Fuller v. City of Oakland,* 47 F.3d 1522, 1529 (9th Cir.1995) ("Title VII does not permit employers to stand idly by once they learn that sexual harassment has occurred. To do so amounts to a ratification of the prior harassment."). Faced with management's failure to punish Atesalp for his known acts of retaliation, Kortan reasonably perceived her work environment as hostile.[5]

The majority effectively insulates Atesalp's retaliatory conduct, however, first by excluding his retaliatory evaluation from its analysis of the hostile work environment and, second, by finding no actionable retaliation because Schulman's evaluation superseded Atesalp's-essentially, "no harm, no foul." I believe both grounds are in error: the totality of the circumstances, including Atesalp's retaliatory evaluation, add up to a triable case of a hostile work environment; and-as I discuss next-even Schulman's evaluation supports a separate claim of retaliation.

II. RETALIATION BASED ON THE POOR EVALUATION

The majority accepts that Atesalp's performance evaluation was retaliatory, and recognizes that an undeserved performance evaluation is actionable under *Yartzoff v. Thomas,* 809 F.2d 1371, 1376 (9th Cir.1987). It attempts to distinguish *Yartzoff,* however, because only Schulman's "corrected" evaluation went into Kortan's personnel file, and it characterizes Schulman's evaluation as not undeserved. *See* maj. op. at 1113. I disagree with this analysis in several respects. First, although Schulman did modify Atesalp's retaliatory-and therefore undeserved-evaluation, he did not go so far as to correct it. Rather, Schulman largely relied on the retaliatory evaluation to give Kortan the lowest evaluation of her five-year career at C.Y.A., and thereby ratified Atesalp's retaliation.

As to the three undeserved ratings Atesalp gave Kortan, in the categories "relationships ***1117** with people," "work habits" and "meeting work commitments," Schulman merely struck a compromise between the highest ("E") rating and Atesalp's unwarranted "I" ratings-moving Kortan up one rating to "M". Schulman may have independently investigated Kortan in the "relationships with people" category, but he did not independently investigate the other two. Schulman contends he lacked a "sufficient record of her performance ... to give her anything more than 'M' ratings" in those categories because she was on evacation or leave for a significant part of the yearly evaluation period, between May and August 1993. This "justification" rings hollow given that Kortan was named "Outstanding Employee of the Year" for the same year, absences and all. Moreover, rather than allow Atesalp's punitive ratings to drag Kortan down, Schulman could have declined to rate Kortan in those two categories for want of personal knowledge, defaulted to Kortan's prior history of "E's" over the years or otherwise memorialized his uncertainty. Instead, he simply compromised and left Kortan with her lowest performance evaluation at C.Y.A. At the end of the day, Schulman's evaluation was at least as harmful to Kortan because, by failing to remove the retaliatory taint of Atesalp's evaluation, Schulman made clear to Kortan that management would not eliminate the adverse effect of Atesalp's retaliation-only lessen it.[6]

Not only does the majority decline to recognize the effect of Schulman's tainted evaluation on Kortan, it also declines to address the "chilling effect which [a supervisor's] retaliatory conduct might have on the remaining employees under his supervision." *Hashimoto v. Dalton,* 118 F.3d 671, 676 (9th Cir.1997); *accord EEOC v. Hacienda Hotel,* 881 F.2d 1504, 1511 (9th Cir.1989). No doubt many C.Y.A. employees observed the conflict between Atesalp and Kortan and learned that the consequence of Kortan exercising her Title VII rights was that she went from "Outstanding Employee" to a

disfavored employee and became the focus of Atesalp's wrath. These employees will likely be deterred from reporting sexual harassment out of fear of retaliation by Atesalp and ending up in the same predicament as Kortan.

Because Schulman's evaluation did not cure, but effectively ratified and perpetuated the " 'deleterious effect on the exercise of [Title VII] rights,' " caused by Atesalp's evaluation, *Hashimoto,* 118 F.3d at 676 (quoting *Garcia v. Lawn,* 805 F.2d 1400, 1405 (9th Cir.1986)), I would hold that Kortan has presented sufficient evidence to defeat summary judgment on her retaliation claim.

Parallel Citations

83 Fair Empl.Prac.Cas. (BNA) 618, 78 Empl. Prac. Dec. P 40,189, 00 Cal. Daily Op. Serv. 5514, 2000 Daily Journal D.A.R. 7386

Footnotes

* Honorable Lloyd D. George, Senior United States District Judge for the District of Nevada, sitting by designation.

2 Also in February of 1994, Atesalp made derogatory comments about two blacks which were offensive to Kortan. She originally sued on account of these remarks as well, but has not appealed dismissal of claims based on racial discrimination.

3 Apparently Atesalp told Kortan that a Georgia O'Keefe poster she had in her office was "suggestive." When Kortan asked what he meant, he said "I will not say it because I'll be in trouble." Then he said: "I'll say it this way, it reminds me of a 'regina.' " Kortan replied: "Oh, you have a dirty mind."

4 The EEOC charge, filed October 31, 1994, alleges that "[s]tarting February 2, 1994, my supervisor, Doctor Atesalp, created a hostile work environment by using racist and sexist terminology in my presence." In the attached Affidavit, Kortan avers that "[i]n early February of 1994 my immediate supervisor, Dr. Atesalp, began to make verbal comments in my presence that were both racist and sexist. I have heard him refer ... to females as 'bitches', 'Madonnas' 'casterating bitches'. 'Regina' and 'histronic' these are just examples, he has used many negative terms to describe both females and Blacks." [sic.]
Kortan's EEOC charge also refers to the CYA investigation, which covered the November 1993 incidents involving the Abrams tape and Altesalp letter responding to it. But Kortan does not base her hostile work environment claim on these incidents.

5 Kortan testified that before she wrote her February 3, 1994 letter, Atesalp treated her well and that she was never harassed by him until she wrote the February 3 memorandum.

6 Recent Supreme Court opinions (rendered after the district court's decision) have discussed an employer's vicarious liability for a hostile work environment, and have recognized the availability of an affirmative defense in certain circumstances. *See, e.g., Burlington Industries v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). Since we hold that Kortan has failed to establish a prima facie case of hostile work environment, we do not address the effect, if any, of these recent opinions on this case.

1 Prior to February 1994, Atesalp, referred to Crawford, a superintendent at C.Y.A., as a "regina" as well as "a castrating bitch." Atesalp had referred to Chavira, another superintendent, as a "castrating bitch" more than once and as a "madonna." The majority overlooks Atesalp's pre-February 1994 statements about Crawford when it says Kortan testified that Atesalp had used the term castrating bitch "[v]ery infrequently" and madonna "once or twice." Maj. Op. at 1108. This testimony was only referring to Atesalp's statements about Chavira. Later in her deposition, Kortan testified that Atesalp had also used these terms to refer to Crawford.

2 Several months prior to February 1994, Atesalp made clear to Kortan that he intended regina to mean vagina when he told her the Georgia O'Keeffe poster in her office was "suggestive" because it reminded him "of a regina."

3 Atesalp also subjected Kortan to his racist comments. He repeatedly referred to one African-American employee as a "black ape," referred to another as a "black goon" and referred generally to African-American wards as "thugs."

4 Schulman's memo contradicts the majority's statement that "there is no evidence showing" Atesalp retaliated by becoming hypercritical of Kortan. *See* maj. op. at 1112.

5 Kortan had reason to be disheartened, because Schulman had initially encouraged her to "take him [Atesalp] on," suggesting Atesalp was a known abuser who needed to be challenged. Yet when Kortan did "take him on," she was the one who suffered adverse consequences.

6 The majority also seems to distinguish *Yartzoff* because Shulman's evaluation was not "subaverage." Ratings need not be

subaverage, however, to constitute retaliation. Rather, it is "*undeserved* performance ratings, if proven, [that] would constitute 'adverse employment decisions' " actionable under the retaliation provision of Title VII. *Yartzoff*, 809 F.2d at 1376 (quotation marks and citation omitted) (emphasis added); *accord Brooks v. City of San Mateo*, 214 F.3d 1082, 1094 (9th Cir.2000); *see also Steiner*, 25 F.3d at 1465 (holding that performance evaluation with only three below average ratings out of seven categories was sufficient adverse employment decision to create prima facie case of retaliation).

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40 F.3d 1551
United States Court of Appeals, Ninth Circuit.

Maivan LAM, Plaintiff-Appellant,
v.
UNIVERSITY OF HAWAI'I; Albert Simone, in his capacity as President of the University of Hawai'i; and Jeremy Harrison, in his capacity as Dean of the Richardson School of Law, Defendants-Appellees.

No. 91-16587. | Argued and Submitted Nov. 5, 1992. | Submission Deferred Nov. 19, 1992. | Resubmitted April 12, 1993. | Submission Deferred Feb. 17, 1994. | Resubmitted May 26, 1994. | Decided Oct. 11, 1994. | As Amended Nov. 21 and Dec. 14, 1994.

Female applicant of Vietnamese descent sued state university's law school, alleging discrimination in application process on basis of race, sex and national origin. The United States District Court for the District of Hawai'i, Harold M. Fong, Chief Judge, entered summary judgment for university on claim relating to first search and hiring process for director of legal studies program, and, following bench trial, entered judgment for university on claim relating to second search. Applicant appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) as to first search, evidence of bias on part of members of appointments committee precluded summary judgment, but (2) trial court did not clearly err in finding that discrimination or retaliation did not play motivating part in decision not to appoint applicant following second search.

Reversed in part and affirmed in part.

West Headnotes (24)

[1] **Civil Rights**
Effect of prima facie case; shifting burden

Once prima facie case of employment discrimination is established, burden then shifts to defendant to articular legitimate nondiscriminatory reason for its employment decision, and then, in order to prevail, plaintiff must demonstrate that employer's alleged reason for adverse employment decision is pretext for another motive which is discriminatory. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-2(a)(1).

14 Cases that cite this headnote

[2] **Civil Rights**
Retaliation claims

Retaliation claims under Title VII are included within *McDonnell Douglas* shifting burdens framework. Civil Rights Act of 1964, § 704(a), as amended, 42 U.S.C.A. § 2000e-3(a).

16 Cases that cite this headnote

[3] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

To survive employer's summary judgment motion, only genuine factual issue with regard to discriminatory intent behind employment decision need be shown, and this requirement is almost always satisfied when plaintiff's evidence, direct or circumstantial, consists of more than *McDonnell Douglas*presumption. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-2(a)(1); Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

47 Cases that cite this headnote

[4] **Federal Courts**
Summary judgment
Federal Courts
Summary judgment

On review of trial court's grant of summary judgment for defendant, Court of Appeals would make all factual inferences in favor of plaintiff and not make any credibility determinations. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

1 Cases that cite this headnote

[5] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

With respect to hiring process for director of public university law school's Pacific Asian legal studies program, summary judgment for university on unsuccessful applicant's claims of race, sex and national origin discrimination was precluded by evidence of discriminatory bias at two stages of hiring process, including evidence that head of appointments committee had biased attitude toward women and Asians and that he had disparaged abilities of applicant, who was female and of Vietnamese descent, and evidence that another white male professor had stated that, given Japanese cultural preferences, program director should be male. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-2(a)(1).

20 Cases that cite this headnote

[6] **Civil Rights**
Practices prohibited or required in general; elements

Existence of third-party preferences for discrimination does not justify discriminatory hiring practices. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-2(a)(1).

1 Cases that cite this headnote

[7] **Civil Rights**
Hiring
Civil Rights
Promotion, demotion, and transfer

Discrimination at any stage of academic hiring or promotion process may infect ultimate employment decision, and thus plaintiff in university discrimination case need not prove intentional discrimination at every stage of decision making process; impermissible bias at any point may be sufficient to sustain liability. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-2(a)(1).

8 Cases that cite this headnote

[8] **Civil Rights**
Hiring

Limitations on liability which are appropriate in context of sexual harassment cases involving employer liability for creation of hostile work environment under doctrine of respondeat superior are wholly inapplicable to discriminatory hiring context. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-2(a)(1).

2 Cases that cite this headnote

[9] **Civil Rights**
Vicarious liability; respondeat superior

University may be liable where university has delegated employment decision to committee, and members of that committee have allegedly engaged in discriminatory treatment. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-2(a)(1).

[10] **Civil Rights**
Hiring

For purposes of unsuccessful employment applicant's Title VII claim, different national origins of applicant and another candidate for position was relevant, even though both candidates were of Asian descent, since applicant alleged not only race discrimination but also national origin discrimination. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. §

2000e-2(a)(1).

[11] **Civil Rights**
Admissibility of evidence; statistical evidence

Nondiscriminatory employer actions occurring subsequent to filing of discrimination complaint will rarely even be relevant as circumstantial evidence in favor of employer, given incentive in such circumstances for employer to take corrective action in attempt to shield itself from liability. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-2(a)(1).

1 Cases that cite this headnote

[12] **Civil Rights**
Questions of law or fact
Federal Civil Procedure
Employees and Employment Discrimination, Actions Involving

For purposes of sex, race, and national origin discrimination claim brought by unsuccessful female applicant of Vietnamese descent, evidence of employer's favorable treatment of other Asian women creates, at most, a genuine dispute as to material factual question, and such evidence does not necessarily defeat claim at trial, nor can it do so at summary judgment. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-2(a)(1); Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

18 Cases that cite this headnote

[13] **Federal Courts**
Summary judgment

Because district court was barred from weighing conflicting evidence in ruling on motion for summary judgment, Court of Appeals would not decide whether evidence of employer's favorable treatment of other Asian women could be deemed relevant to, though not determinative of, claim of sex and race discrimination, or whether such evidence was wholly irrelevant. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-2(a)(1); Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

3 Cases that cite this headnote

[14] **Civil Rights**
Motive or intent; pretext
Civil Rights
Motive or intent; pretext
Civil Rights
Other particular bases of discrimination or classes protected

When Title VII plaintiff is claiming both race and sex bias, it is necessary to determine whether employer discriminates on basis of that combination of factors, not just whether it discriminates against people of same race or of same sex. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-2(a)(1).

19 Cases that cite this headnote

[15] **Civil Rights**
Admissibility of evidence; statistical evidence

Professor's testimony as to biases held by chairman of appointments committee was admissible in race, sex, and national origin discrimination suit brought by unsuccessful applicant for university law school position, since professor testified not to remote acts but to consistent pattern of behavior on part of chairman, with one manifestation of his alleged discriminatory attitude having occurred only a few months before position search. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-2(a)(1); Fed.Rules Evid.Rule 403, 28 U.S.C.A.

5 Cases that cite this headnote

[16] **Civil Rights**
Presumptions, Inferences, and Burden of Proof

In antidiscrimination cases, as in other areas of law, plaintiff bears heavier evidentiary burden if factual context renders his claim implausible. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
1 Cases that cite this headnote

[17] **Civil Rights**
Practices prohibited or required in general; elements

Fact that adverse economic consequences may flow from alleged act of employment discrimination does not render allegation implausible; antidiscrimination laws are not predicated upon existence of economically "rational" discrimination, but rather problem that exists and which such laws target is, to large extent, stubborn but irrational prejudice. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
1 Cases that cite this headnote

[18] **Civil Rights**
Education, employment in

Sex discrimination claims brought by unsuccessful applicant for university position were not rendered implausible in context of present academic climate, despite university's contention that, in that climate, acts that would have even appearance of bias would constitute professional suicide. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-2(a)(1).

[19] **Federal Courts**
Clearly Erroneous Findings of Court or Jury in General

District court's findings of fact are reviewed under "clearly erroneous" standard.

2 Cases that cite this headnote

[20] **Federal Courts**
Trial de novo

District court's legal conclusions are reviewed de novo.

1 Cases that cite this headnote

[21] **Civil Rights**
Presumptions, Inferences, and Burden of Proof

Under Title VII, ultimate burden of persuading trier of fact that employer intentionally discriminated remains at all times with plaintiff. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-2(a)(1).

1 Cases that cite this headnote

[22] **Civil Rights**
Defenses in general
Civil Rights
Presumptions, Inferences, and Burden of Proof

Under *Price Waterhouse* rule, employer who is proven to have discriminated can still avoid liability by showing by preponderance of evidence that employment decision would have been same even if discrimination had played no role, and burden is on employer to make this showing as affirmative defense. Civil Rights Act of 1964, §§ 703(a)(1), (m), 706(g)(2)(B)(i), as amended, 42 U.S.C.A. §§ 2000e-2(a)(1), (m), 2000e-5(g)(2)(B)(i).

4 Cases that cite this headnote

[23] **Civil Rights**
Presumptions, Inferences, and Burden of Proof

Once employer has met its initial burden of production in employment discrimination case, district court may rule in its favor on basis of any facts in record supporting its position, even though court may entirely disbelieve employer's proffered rationale. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
2 Cases that cite this headnote

[24] **Civil Rights**
Effect of prima facie case; shifting burden
Civil Rights
Retaliation claims

Although there was strong circumstantial evidence of discrimination and retaliation with respect to hiring process for university position, trial court's determination that discrimination or retaliation did not play motivating part in decision not to appoint female Asian applicant to position was not clearly erroneous, and thus burden never shifted to university to show that it would not have appointed her even in absence of discriminatory or retaliatory motives, where trial court found that each member of appointments committee independently found applicant insufficiently qualified to merit inclusion as finalist. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-2(a)(1).

12 Cases that cite this headnote

Attorneys and Law Firms

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Carin Ann Clauss, Madison, WI, and Joan E. Bertin, Isabelle Katz Pinzler, New York City, for amici curiae American Civ. Liberties Union, Asian American Legal Defense and Education Fund, Asian Law Caucus, Asian Pacific American Legal Center, Center for Constitutional Rights, Equal Rights Advocates, Nat. Conference of Black Lawyers.

Appeal from the United States District Court for the District of Hawai'i.

Before: BROWNING, NORRIS and REINHARDT, Circuit Judges.

Opinion

REINHARDT, Circuit Judge:

Professor Maivan Clech Lam, a woman of Vietnamese descent, claims that the University of Hawai'i's Richardson School of Law ("the Law School") discriminated against her on the basis of her race, sex and national origin both times she applied for the position of Director of the Law School's Pacific Asian Legal Studies Program. Lam first applied for the directorship during the Law School's 1987-1988 hiring search (the "first search") and became a finalist in that search; however, the faculty cancelled the search without hiring anyone. She again applied during the Law School's 1989-1990 search (the "second search"), but the Law School offered the position to another candidate. When that candidate declined to accept the position, the faculty again cancelled the search. Lam also claims that the Law School's actions constituted unlawful retaliation.

Lam filed suit under 42 U.S.C. § 2000e *et seq.* ("Title VII") and other anti-discrimination statutes.[1] The district court granted partial summary judgment to defendants as to the first search, then, after a bench trial, granted final judgment to defendants as to the second search. Because we find a genuine issue of material fact regarding whether the defendants violated Title VII in considering Lam's application during the first search, ***1555** we reverse the award of partial summary judgment and remand for trial as to that search.[2] However, finding no material legal errors in the district court's decision as to the claimed discrimination and retaliation during the second search, we affirm the court's award of final judgment as to that search.

I.

Lam was born in Vietnam of French and Vietnamese parentage, and is fluent in French, English, Vietnamese and Thai. She graduated *magna cum laude* with a B.A. in English and Economics from Marygrove College in

Detroit, Michigan in 1965. After college she received a masters degree in Southeast Asian studies at Yale University in 1967, and was later awarded a Ford Foundation Fellowship. After several years as a full-time mother, Lam taught anthropology courses at Hawai'i Loa College between 1974-1981. She then obtained a second masters degree from Yale in Anthropology.
In 1982, she collaborated with her husband, a professor at the University of Hawai'i, on two monographs on administration and social movements in Vietnam. In 1984, she graduated from the Richardson School of Law, after having completed an externship with the Chief Justice of the Federated States of Micronesia. While she was a law student, she wrote two law review articles on Hawai'ian land law that were published after her graduation: one in the *Journal of Legal Pluralism* and the other in the *University of Washington Law Review*. During and after law school, Lam was assistant director of the Law of the Sea Institute, an organization that was affiliated with the University of Hawai'i and under the direction of Emeritus Law Professor John Craven. After graduating from law school, Lam taught courses at Hawai'i Loa College, served as a lecturer in the University of Hawai'i's political science department, and gave guest lectures before Professor Craven's ocean law class at the Law School.3

A.

In the fall of 1987, the Law School began a hiring search for a full-time director for its Pacific Asian Legal Studies ("PALS") program.4 Approximately 100 persons applied for the position, including Lam. The Law School established an appointments committee consisting of Professor Mari Matsuda, who was the chair, Professors Eric Yamamoto and Randall Roth, and two students to screen applicants and to recommend a list of finalists for review by the full faculty. By ***1556** some time in January 1988, the appointments committee had prepared a list of ten names, including Lam's, for submission to the faculty. Five of the ten candidates were women, among whom were two of the three ethnic Asians recommended. Matsuda chose Lam as one of her top two candidates.
Because of a previously scheduled semester's leave, Matsuda had to resign from the appointments committee. Professor A., a senior faculty member, approached Matsuda expressing his interest in becoming chair and asking that she forward his request to the Dean of the law school. Matsuda, who was a friend of Lam's, knew that Professor A. and Lam had had a "run-in" the previous year.5 Matsuda nonetheless passed along Professor A.'s request to the Dean while also recommending that a woman faculty member be appointed to the committee. Subsequently, Professor A. was appointed to the committee along with a woman professor. At the same time, Professor Williamson Chang, a member of the PALS committee, began to attend appointments committee meetings on an ex officio basis.6

After Professor A. became chair of the appointments committee, the group discussed forwarding one name, that of a white male, rather than ten names to the faculty. When Chang informed Lam of this development, she became concerned and set up a meeting with the Dean to discuss the situation. Lam told the Dean of her prior problems with Professor A., but said that she was worried that if Professor A. were forced to resign from the committee his colleagues would blame her. She thus did not request Professor A.'s removal from the committee, but instead asked that the committee recommend five names to the faculty instead of one.

The Dean, in turn, mentioned to her the idea of cancelling the search and reopening it to accommodate an Asian male candidate who had missed the application deadline. In his view, this course of action had the dual benefit of mooting any possibility of obstruction by Professor A., since there would be a new chair for the new search, and of allowing consideration of the late applicant. Lam disagreed with his proposal, stating that it would be unfair to reopen the search.

There was vigorous debate regarding Lam's application at a March 2, 1988 joint meeting of the PALS and appointments committees. Professor A., in particular, asserted that Lam was not collegial, was a poor scholar, and had poor administrative ability. He finally stated that in his view Lam was unfit to teach anywhere on the University of Hawai'i campus. He also labelled Lam's in-print criticism of another (white male) faculty member inappropriate. Craven spoke up strongly for Lam at this meeting.

Both Craven and Chang later went to the Dean to complain of Professor A.'s behavior and to recommend his removal as chair of the appointments committee. At approximately the same time, Lam spoke to the campus EEO officer about the Dean's idea of reopening the search in order to consider the late applicant, leading the EEO officer to call the Dean and advise him against that plan. In accordance with Lam's request and the EEO officer's recommendation, the Dean then announced that the faculty was not to consider the late applicant. The Dean also announced that Professor A. had resigned from the committee and that Roth had replaced him as chair. Although most of the faculty believed that Professor A. resigned because of a conflict with Lam, the Dean never attempted to alleviate the resulting controversy by publicly explaining the events.

The candidate list was eventually narrowed down to four, including Lam, whose applications *1557 were considered by the full fifteen-member faculty of the law school at a meeting on March 18. At that meeting both Craven and Professor A. spoke strongly for their respective positions regarding Lam. Their polarization apparently made the rest of the faculty uncomfortable. Although a white male candidate apparently received the highest number of votes, a consensus did not form around any of the candidates and there was no decision to extend any offer of employment. Two weeks later a bare majority of the faculty voted to cancel the search.

B.

In response to the first search's cancellation, Lam filed a discrimination complaint with the office of the University vice-president. Although the University rejected her administrative grievance after an investigation, it issued a report detailing confidentiality breaches and procedural violations in the PALS director search process. The University vice-president told Lam that he would issue stern instructions to the Law School Dean requiring that the next search for the PALS directorship be conducted pursuant to strict guidelines, with the position's qualifications explicitly drawn. He asserted that it would be a "fishbowl operation" consistent with the highest standards of procedure.

At a Law School faculty meeting in September 1988, two University EEO officers discussed selection procedures and recommended, among other things, the use of rating sheets and a clear definition of the PALS program and its director. At the Dean's request, Professor Matsuda prepared a memo on search procedures for the law school in which she proposed that desired characteristics be ranked and that minority applicants be encouraged. Further procedures outlined in University affirmative action guidelines mandated that interview questions, rating sheets, selection evaluation sheets, and copies of recruitment/selection forms be kept on file for three years.

Lam and a support group that had formed around the issue of her treatment by the University leveled charges of discrimination and procedural irregularities in the first search in many outside fora, including the Equal Employment Opportunity Commission, the American Association of Law Schools (AALS), the ABA, the Hawai'i legislature, and the press. As a result, Lam's allegations received both newspaper and radio coverage, and the Dean of the Law School and the President of the University were "cross-examined" about them at an AALS meeting relating to the Law School's request for accreditation.

The faculty decided to reopen the search for a PALS director in 1989. The announcement for the position was essentially identical to the one employed during the first search, and Lam again applied, along with 87 other applicants. All of the members of the 1987-88 appointments committee were either unwilling or unable to serve again. The Dean asked two faculty members who had voted for Lam the first time to serve on the committee, but they declined. The appointments committee ultimately consisted of three white members of the faculty who did not support Lam in 1988[7] (one was an untenured woman professor), along with two students of Asian ancestry.
Early in the 1989-90 academic year, the new appointments committee reviewed applications for a commercial law position. At one meeting, a male committee member stated that the Law School should not have two women teaching commercial law. This comment was reported to the Dean, who said that he recognized that the professor had difficulty dealing with women but took no action to remove him from the committee or otherwise to remedy the problem.[8]

When the appointments committee concluded its deliberations regarding the commercial *1558 law position, the chair distributed copies of the announcement for the PALS directorship and a brief description of the program to aid the committee in reviewing the applicants for the position. Besides these materials, guidance for the selection process was minimal: members of the committee independently selected the 15 to 20 candidates that they considered most promising and the committee list was compiled based on these separate lists. The chair, who had been on leave the previous semester, had not been informed by the Dean of the extensive discussions and developments that had taken place regarding selection procedures. None of the suggestions or recommendations of Professor Matsuda or of the EEO officers was employed. Despite all of the past debate over the possibility of discrimination and the need for careful selection procedures, no mechanism was put into place to screen out potential bias or retaliatory sentiments resulting from the prior search.
Lam did not appear on any of the committee member's lists, and neither Lam nor her application was ever discussed at any committee meetings. The final list of candidates that the committee recommended to the faculty consisted entirely or almost entirely of persons of United States origin, both white and non-white,[9] in contrast to the substantial number of non-whites and foreign-born candidates appearing on the list prepared by the previous appointments committee. The faculty met with six of the top candidates, three of whom had applied during the first search and been awarded lower ratings than Lam.[10]

The faculty voted to offer the PALS position to Alison Conner, a white Harvard Law graduate with a Ph.D in Chinese History who had substantial law teaching experience and several publications. Conner, however, declined to accept the offer. Rather than make an offer to any of the other applicants, the faculty again cancelled the search.

C.

Lam filed suit in May 1989 against the University of Hawai'i, the Dean of the Law School, and the President of the University, alleging discrimination on the basis of race, sex and national origin with regard to the 1987-88 search, as well as retaliation. Defendants moved for summary judgment in July 1990 and Lam amended her complaint to allege discrimination and retaliation during the second search. In response, defendants filed a motion for summary judgment regarding that search. The district court granted defendants' motion for summary judgment regarding the first search, but determined that there was a genuine issue of material fact as to whether the defendants intentionally discriminated against Lam, or retaliated against her, in connection with the 1989-90 search. After a bench trial, the district court entered judgment for the defendants as to the second search. Lam now appeals both rulings.

II.

Title VII provides that "[i]t shall be an unlawful employment practice for an employer ... to fail or refuse to hire ... any individual ... because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). It also prohibits an employer from retaliating against an applicant for employment because the applicant has opposed any unlawful employment practice, or has made a charge, testified, assisted, or participated in an employment discrimination ***1559** investigation or proceeding. 42 U.S.C. § 2000e-3(a).

A.

We turn first to Lam's appeal of the district court's grant of summary judgment as to the first search.

1.

A *prima facie* case of unlawful employment discrimination on the basis of protected characteristics may be established through indirect evidence under the familiar *McDonnell Douglas* four-part test. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, ----, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 (1993) (citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)). In *McDonnell Douglas,* the Supreme Court held that the plaintiff can make out a *prima facie* case by showing that (1) she belongs to a protected class, (2) she applied for and was qualified for a job for which the employer was seeking applicants, (3) despite being qualified, she was rejected, and (4) after her rejection, the position remained open and the employer continued to seek applicants from people of comparable qualifications. 411 U.S. at 802, 93 S.Ct. at 1824.

[1] [2] After a *prima facie* case is established, "the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its employment decision. Then, in order to prevail, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory." *Wallis v. J.R. Simplot Co.,* 26 F.3d 885, 889 (9th Cir.1994) (quoting *Lowe v. City of Monrovia,* 775 F.2d 998, 1005 (9th Cir.1985), *as amended,* 784 F.2d 1407 (9th Cir.1986)).[11]

[3] On summary judgment, the existence of a discriminatory motive for the employment decision will generally be the principal question. To survive an employer's summary judgment motion, only a genuine factual issue with regard to discriminatory intent need be shown, a requirement that is almost always satisfied when the plaintiff's evidence, "direct or circumstantial, consists of more than the *McDonnell Douglas* presumption." *Sischo-Nownejad v. Merced Community College Dist.,* 934 F.2d 1104, 1111 (9th Cir.1991); *compare J.R. Simplot Co.,* 26 F.3d at 890 (summary judgment appropriate, after showing of a "bare *prima facie* case," where evidence to refute defendant's legitimate explanation is "totally lacking"). Because we find that Lam satisfied this requirement, we reverse the district court's grant of summary judgment to defendants.

2.

The district court found that Lam had established a *prima facie* case of discrimination under the four-part *McDonnell Douglas* test.[12] It then found that defendants had ***1560** met their burden of proffering legitimate reasons for not hiring Lam-specifically, Lam's lack of scholarship, and faculty disagreement regarding the desired characteristics of the PALS director-shifting the burden back to Lam to show the existence of a triable issue of fact.

[4] [5] [6] Lam submitted evidence of discriminatory bias at two stages of the hiring process, with respect to at least two senior white male professors. Most significantly, Craven testified that Professor A., who headed the appointments committee for a month and disparaged Lam's abilities before the committee and the faculty as a whole, had a biased attitude toward women and Asians. Indeed, the district court specifically found that "the evidence suggests that Professor A. harbored prejudicial feelings towards Asians and women." There was also evidence that another white male professor had stated that, given Japanese cultural prejudices,[13] the PALS director should be male. This evidence is, as a matter of law, sufficient to preclude the award of summary judgment for defendants.

The district court articulated two reasons in support of its decision to grant summary judgment, the primary one being that any faculty prejudice that existed could not, in its view, be attributed to the named defendants in the action. Although the court acknowledged that members of the faculty "may very well have harbored prejudices against Asians and women in general, and against plaintiff in particular," it ruled that "without proof that the named defendants either shared those prejudices or conformed their conduct under influence of those prejudices, [the facts] are insufficient to support a showing of intentional discrimination by defendants." Consistent with its focus on the individual defendants, the court found it crucial that the Dean asked Professor A. to resign as chair of the appointments committee.[14] As this undue emphasis on the Dean and corresponding disregard of the faculty members demonstrates, however, the court failed to give proper consideration to the nature of the university's hiring process.

The principal defendant in this case is the University, which has delegated to the faculty near-total control over hiring. The faculty, first in committee, then as a whole, reviews applications, chooses the final candidates, and votes on whether to extend any candidate an offer of employment. The hiring process is therefore not insulated from the illegitimate biases of faculty members. Indeed, since the faculty is small-only fifteen members-and great emphasis is placed on collegiality and consensus decisionmaking, even a single person's biases may be relatively influential. That is particularly true where, as here, that person plays a significant role in the selection process and leads the fight pro or con with respect to a particular candidate. *See Gutzwiller v. Fenik,* 860 F.2d 1317, 1327 (6th Cir.1988) (two biased faculty votes sufficient to establish discriminatory employment decision in tenure process that required decisions at four separate levels).

[7] As other courts have recognized, discrimination at any stage of the academic hiring or promotion process may infect the ultimate employment decision. *Roebuck v. Drexel Univ.,* 852 F.2d 715, 727 (3d Cir.1988). Accordingly, a plaintiff in a university discrimination case need not prove intentional discrimination at every stage of the decisionmaking process; impermissible bias at any ***1561** point may be sufficient to sustain liability. *Id.; Fields v. Clark University,* 817 F.2d 931, 933-35 (1st Cir.1987) (where departmental recommendation important, evidence of sexist bias within sociology department sufficient to sustain liability under Title VII, even absent evidence of improper bias on the part of the ultimate deciding authority). Here, the purported bias allegedly had its ultimate impact at the faculty meeting stage.

[8] [9] Defendants argue, nonetheless, that they can only be held liable if it is shown that they "knew or in the exercise of reasonable care should have known" of Professor A.'s biased attitudes. They cite *EEOC v. Hacienda Hotel,* 881 F.2d 1504, 1515-16 (9th Cir.1989); *Ellison v. Brady,* 924 F.2d 872, 881 (9th Cir.1991), as mandating this rule. However, *Hacienda Hotel* and *Ellison* are both sexual harassment cases involving employer liability for the creation of a hostile work environment under the doctrine of respondeat superior. Limitations on liability appropriate in that context are wholly inapplicable to the discriminatory hiring context. As numerous cases involving discrimination in faculty hiring and promotion demonstrate, where a university has delegated employment decisions to a committee and members of that committee have allegedly engaged in discriminatory treatment, the university is liable.[15] *See, e.g., Ruggles,* 797 F.2d at 784; *Fields,* 817 F.2d at 932.

[10] [11] The district court's second justification for granting summary judgment was based on the defendants' favorable consideration of two other candidates for the PALS position: one an Asian man, the other a white woman. In assessing the significance of these candidates, the court seemed to view racism and sexism as separate and distinct elements amenable to almost mathematical treatment, so that evaluating discrimination against an Asian woman became a simple matter of performing two separate tasks: looking for racism "alone" and looking for sexism "alone," with Asian men and white women as the corresponding model victims. The court questioned Lam's claim of racism in light of the fact that the Dean had been interested in the late application of an Asian male.[16] Similarly, it concluded that the faculty's subsequent offer of employment to a white woman indicated a lack of gender bias.[17] We conclude that in relying on these facts as a basis for its summary judgment decision, the district court misconceived important legal principles.

[12] [13] [14] To begin with, even the Law School's favorable treatment of other Asian women would not necessarily defeat Lam's claim at trial. *See Gutzwiller,* 860 F.2d at 1320-21 (tenure position denied one white female professor in favor of another). Certainly it could not do so at summary judgment, for such evidence creates at most a genuine dispute as to a material factual question. ***1562** 18 At least equally significant is the error committed by the court in its separate treatment of race and sex discrimination. As other courts have recognized, where two bases for discrimination exist, they cannot be neatly reduced to distinct components. *See Jefferies,* 615 F.2d at 1032-34; *Graham v. Bendix Corp.,* 585 F.Supp. 1036, 1047 (N.D.Ind.1984); *Chambers v. Omaha Girls Club,* 629 F.Supp. 925, 946 n. 34 (D.Neb.1986), *aff'd,* 834 F.2d 697 (8th Cir.1987).19 Rather than aiding the decisional process, the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences.20 *Cf. Moore v. Hughes Helicopters, Inc.,* 708 F.2d 475, 480 (9th Cir.1983) (black female not necessarily representative of interests of black males and white females). Like other subclasses under Title VII, Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women.21 In consequence, they may be targeted for discrimination "even in the absence of discrimination against [Asian] men or white women." *Jefferies,* 615 F.2d at 1032 (discussing black women); *Hicks v. Gates Rubber Co.,* 833 F.2d 1406, 1416 (10th Cir.1987) (same). Accordingly, we agree with the *Jefferies* court that, when a plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors, not just whether it discriminates against people of the same race or of the same sex. *Cf. Connecticut v. Teal,* 457 U.S. 440, 455, 102 S.Ct. 2525, 2535, 73 L.Ed.2d 130 (1982) ("Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired.").

3.

[15] The defendants assert several additional arguments in support of the grant of summary judgment. First, citing *Hunter v. Allis-Chalmers Corp.,* 797 F.2d 1417, 1423 (7th Cir.1986), and *Garvey v. Dickinson College,* 763 F.Supp. 799, 801-02 (M.D.Pa.1991), they argue that Craven's testimony as to Professor A.'s biases was inadmissible because it concerned acts and comments on Professor A.'s part that were too remote in time or too attenuated from Lam's situation. Although the *Allis-Chalmers* court stated that acts "remote in time or place" may be excluded under Fed.R.Evid. 403, it affirmed the admission of evidence of long-term harassment of black workers because such evidence demonstrated a "persistent pattern" of racial hostility. 797 F.2d at 1423-24. The *Garvey* court affirmed the admissibility of evidence of discriminatory incidents that occurred within the plaintiff's department, while excluding such evidence from other departments. 763 F.Supp. at 802. Even ***1563** read broadly, neither case is helpful to defendants. Craven testified not to remote acts but to a consistent pattern of behavior on the part of Professor A.-a member of the relevant department-with one manifestation of his alleged discriminatory attitude having occurred only a few months before the directorship search.

Next, defendants argue that *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), establishes a rule, triggered here, that if the factual context renders a plaintiff's claim implausible, she must come forward with more persuasive evidence to support her claim than would otherwise be necessary. *See id.* at 587, 106 S.Ct. at 1356. They argue that because Professor A.'s alleged ethnic and gender biases would amount to professional suicide in today's politically correct academic climate, Lam's charges "simply make[ ] no economic sense," *id.,* thus justifying this more demanding evidentiary burden. Specifically, they cite to the lack of corroboration of Craven's testimony as to Professor A., insisting on other evidence of his bias. We find defendants' reliance on *Matsushita* to be misplaced.

The rule established in *Matsushita* pertains only to the plausibility of inferences drawn from circumstantial evidence. *McLaughlin v. Liu,* 849 F.2d 1205, 1207 (9th Cir.1988). *Matsushita* does not, therefore, affect our consideration of Craven's allegations-which we accept as true for purposes of summary judgment-even if it would require us to question implausible inferences therefrom.

[16] [17] [18] Moreover, while in antidiscrimination cases as in other areas of law, a plaintiff bears a heavier evidentiary burden if the factual context renders his claim implausible, *see Morales v. Merit System Protection Board,* 932 F.2d 800, 802-03 (9th Cir.1991), Lam's charges are by no means implausible. The fact that adverse economic consequences may flow from an alleged act of employment discrimination does not render the allegation implausible. Antidiscrimination laws are not predicated upon the existence of economically "rational" discrimination; the problem that exists and which such laws target is, to a large extent, stubborn but irrational prejudice. Thus, we cannot say that Lam's charges are "implausible" simply because the discriminatory actions might have an adverse economic impact on Professor A. or the University. *Cf. Sischo-Nownejad,* 934 F.2d at 1110

n.10 (finding no circumstances rendering Title VII claim implausible).[22] Nor are we persuaded by the University's assertion that Lam's claims are implausible in the present academic climate because acts that have even the appearance of bias would constitute professional suicide. To accept the University's argument would be to create a presumption that acts of academic employment discrimination are implausible and that the *Matsushita* burden applies to all such cases. This presumption is patently contrary to fact and we squarely reject it. There is no question that acts of bias and discrimination occur in university hirings today. The process of rooting out discrimination against women and minorities on our nation's faculties is far from ended.

Finally, not only is the point of defendants' argument that "charges of bias should not be made lightly," somewhat elusive, but the cases they cite, which concern recusal of administrative law judges and other impartial arbitrators in judicial and administrative hearings, are inapposite.[23] ALJs and judges are presumed to be impartial in their decisions. ***1564** A member of a faculty appointments committee is, in contrast, likely to be personally interested in the outcome of the process.

4.

As we have previously explained, "[w]e require very little evidence to survive summary judgment" in a discrimination case, "because the ultimate question is one that can only be resolved through a 'searching inquiry'-one that is most appropriately conducted by the factfinder, upon a full record." *Sischo-Nownejad,* 934 F.2d at 1111. Besides an overall more particularized factual inquiry, a trial provides insight into motive, a critical issue in discrimination cases. The existence of an intent to discriminate may be difficult to discern in depositions compiled for purposes of summary judgment, yet it may later be revealed in the face-to-face encounter of a full trial.

The university setting-in which, as in this case, employment decisions are made by a group, and collegiality and personal relationships are often significant factors-presents an especially difficult one in which to evaluate allegations of discrimination. As with all group decisionmaking, a complex of motives may exist. Personal animus, factional infighting and politics may influence and even determine certain faculty employment decisions, and are legally permissible if not praiseworthy bases for such decisions. Without a full factual inquiry, however, it may be extremely difficult to distinguish these types of permissible, though relatively personal, motivations from unlawful ones. Accordingly, although for purposes of this appeal we have considered the evidence in the light most favorable to Lam, because the district court granted summary judgment for defendants, we express no view on the reasons underlying the faculty's decision to cancel the first search. Instead, we necessarily reserve the resolution of all factual issues to the district court following a full presentation of the evidence.

B.

We turn next to Lam's appeal of the final judgment regarding discrimination and retaliation in the second search.

1.

[19] [20] We review the district court's findings of fact under the "clearly erroneous" standard. *Muntin v. State of Cal. Parks & Recreation Dept.,* 738 F.2d 1054, 1055 (9th Cir.1984). Legal conclusions are reviewed de novo. *Miller v. Fairchild Industries, Inc.,* 885 F.2d 498, 503 (9th Cir.1989), *cert. denied,* 494 U.S. 1056, 110 S.Ct. 1524, 108 L.Ed.2d 764 (1990).

[21] [22] Under Title VII the ultimate burden of persuading the trier of fact that the employer intentionally discriminated " 'remains at all times with the plaintiff.' " *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, ----, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 (1993) (quoting *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981)); *see also United States Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983). However, under the rule enunciated in *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion), an employer who is proven to have discriminated can still avoid liability by showing by a preponderance of the evidence that "the employment decision would have been the same even if [discrimination] had played no role." *Sischo-Nownejad,* 934 F.2d at 1110 (citing *Price Waterhouse,* 490 U.S. at 243-47, 109 S.Ct. at 1786-89).[24] The burden is on the employer to make this showing as ***1565** an affirmative defense. *Price Waterhouse,* 490 U.S. at 246, 109 S.Ct. at 1788.[25]

2.

In its findings of fact and conclusions of law, the district court first determined that Lam had established a prima facie case of discrimination and retaliation. It then found

that "[s]ome members of the faculty and administration resented Lam's actions and one committee member had difficulty dealing with women." It did not, however, conclude that discrimination or retaliation played a motivating factor in the Law School's failure to hire Lam. Instead, it held that the discriminatory and retaliatory animus was not causally linked to either the selection of appointments committee members or the decision of the appointments committee not to submit Lam's name to the faculty. The court also noted that there was no "concerted action" among committee members to keep her name off each of their lists.

In addition, the court found that subjective hiring criteria were unevenly applied. Nonetheless, it concluded that this was due to faculty uncertainty regarding the desired goals and attributes of the PALS program and the unorganized and inefficient search conducted by the Law School, rather than to discrimination or retaliation. Likewise, the court concluded that the Dean's inquiry regarding whether one candidate's application was weaker than Lam's did not evidence prohibited motivations but instead reflected concern over the Law School's legal difficulties with Lam.[26]

The court ultimately determined that Lam would not have been hired by the Law School, "even given a well-organized and thorough search procedure," because the members of the appointments committee had each determined that she was less qualified than the candidates they recommended. Accordingly, the court ruled that Lam failed to prove a violation of Title VII.

3.

Lam alleges four principal errors in the district court's ruling. First, she claims that the court erred by "inventing a non-discriminatory reason" for the defendants' failure to hire Lam. Second, she claims that the proffered reason is insufficient as a matter of law. Third, she claims that the court improperly required that Lam show "concerted action" to retaliate. Fourth, she claims that the court misapplied the applicable legal standards.

[23] Lam's first and second arguments pertain to her contention that the district court improperly supplied the rationale that disorganization was the legitimate nondiscriminatory reason for the decision not to hire Lam in the second search. For two reasons, however, these arguments must fail. First, although the district court found that the search was disorganized, it attributed the ultimate decision not to appoint Lam to the search committee's lawful determination that her qualifications were weaker than those of the candidates it recommended. The court's discussion of disorganization was included simply to explain the uneven application of ***1566** hiring criteria, which Lam had asserted was evidence of discrimination. Second, *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), precludes Lam's argument. In *Hicks,* the Supreme Court held that, once the employer has met its initial burden of production, the district court may rule in its favor on the basis of any facts in the record supporting its position, even though the court may entirely disbelieve the employer's proffered rationale. *Id.* at ---- - ----, 113 S.Ct. at 2755-56. In any event, here the court did rely on the nondiscriminatory reason advanced by the defendants, and that reason was clearly sufficient as a matter of law.

Lam also argues that the district court improperly required that concerted action among committee members be shown. Lam is of course correct in asserting that there is no requirement under Title VII of concerted action to discriminate or retaliate. In the present case, however, the court simply noted the absence of concerted action as relevant to his conclusion that each committee member independently found Lam insufficiently qualified to merit inclusion as a finalist; there is no indication that the court thought that concerted action was required.

[24] Lam's fourth argument for reversal is that the district court misapplied the relevant legal standards. In her view, there was sufficient evidence of discrimination and retaliation to trigger the burden-shifting requirement of *Price Waterhouse.* Therefore, Lam contends, the district court erred by failing to require the defendants to show that they would not have appointed her even in the absence of the discriminatory and retaliatory motives.

It is true that the district court here recited the *Price Waterhouse* burden-shifting rule in its opinion. It is also true that the court failed to shift the burden to the defendants. Because, however, the burden shifts only when the court finds that unlawful discrimination played a part in the employment decision, and because here the court clearly found that impermissible motives were not a factor in the decision, the court had no reason to apply the *Price Waterhouse* rule. Even though Lam presented strong circumstantial evidence of discrimination and retaliation, she did not, in the court's view, show that it is more likely than not that discrimination or retaliation " 'played a motivating part in [the] employment decision.' " *Sischo-Nownejad,* 934 F.2d at 1110 (quoting *Price Waterhouse,* 490 U.S. at 244, 109 S.Ct. at 1787). Upon a review of the record, we cannot say that this finding is clearly erroneous.[27]

III.

We therefore reverse the district court's award of summary judgment for the defendants *1567 as to the first search and remand for further proceedings, but affirm the decision granting final judgment for the defendants as to the second search. The fact that we find no clear error in the district court's findings of fact in connection with the second search does not affect our decision to remand for trial as to the first search. In its decision regarding the second search, the court did not itself find Lam objectively less qualified than the other candidates: it simply found that the search committee members had come to that conclusion and that it was lawful for them to do so. The court did not conclude, moreover, that it would have been unreasonable for the committee members to have chosen Lam, nor did it conclude that the faculty would have failed to select her had she been recommended. In the first search, of course, the members of the search committee *did* find Lam sufficiently qualified to merit consideration by the full faculty.28 Her name was included in the final list of four recommended candidates. On the basis of the record before us, we cannot say that absent the alleged bias the faculty would have failed to select Lam for the PALS directorship following the first search.

REVERSED in part and AFFIRMED in part.

Parallel Citations

66 Fair Empl.Prac.Cas. (BNA) 74, 65 Empl. Prac. Dec. P 43,341, 95 Ed. Law Rep. 875, 41 Fed. R. Evid. Serv. 629

Footnotes

1 Lam also alleged violations of 42 U.S.C. § 1981, 42 U.S.C. § 1983, 42 U.S.C. § 2000d (Title VI) and 20 U.S.C. § 1681 *et seq.* (Title IX). The Title VII claim was the focus of the litigation, however, and the district court's conclusions of law regarding the other alleged statutory violations are extremely summary, simply restating the overall conclusion that Lam did not prove discrimination on the basis of race, sex or national origin. Insofar as our remand of Lam's Title VII claim causes the district court to amend its conclusions regarding discrimination, a reconsideration of its other statutory rulings will, of course, be necessary.

2 Since it was ruling upon a motion for summary judgment, the district court made all factual inferences in favor of Lam and did not make credibility determinations. We must do the same on review of the court's decision. In doing so, of course, we express no view regarding the truth of such allegations of bias. Specifically, we do not intend by anything we say in this opinion to suggest or imply that any individual engaged in any speech or conduct of a biased or prejudicial nature.

3 Lam also belongs to several professional associations and has served on the Board of the Commission on Folk Law and Legal Pluralism of the International Congress of Anthropological and Ethnological Sciences. In addition, she is a member of the Hawai'i bar.

After the initiation of the present litigation, Lam was hired by the University of Wisconsin law school. She later accepted an associate professorship at CUNY law school, which began in the fall of 1992.

4 The advertisement for the position read:

> Duties: To develop an internationally recognized comparative law program, with a focus on the Pacific Basin region. The position may entail conference organizing, grant-writing, liaison with Pacific-Asian scholars, and working with students and systems. Additionally, teaching of related courses, scholarship, professional activities, committee. *Desirable Qualifications:* An outstanding academic record and proven or potential excellence in scholarship and teaching. Foreign language abilities; familiarity with Asian, Pacific and international scholars, organizations, international law, or comparative law. Ability to teach courses in the J.D. program. Should be able to teach courses in Public or Private International Law, International Business Transactions or a comparative law course on specific legal systems. Administrative experience and creative talents are important..... *Closing Date:* January 15, 1988.

5 The incident involved funding sought by Professor A. for a workshop he attended in Goa, India. Lam allegedly exposed certain misrepresentations made by Professor A. in connection with this funding, embarrassing him. As a result, Lam was dismayed when she found out that Professor A. would be replacing Matsuda as chair of the appointments committee.

6 The PALS Committee was a separate committee charged with developing policy with respect to the PALS program; Craven was another of its members.

7 Since faculty balloting during the first search was open and in the presence of the Dean, he would have been aware of faculty members' previous votes.

8 The woman law professor who spoke to the Dean about the male professor's comment testified that she believed the comment was seriously meant, and that the search was "seriously tainted" by the male professor's attitude toward women applicants. She suggested that it was inappropriate to continue the application process with the committee as then constituted. The male professor did, however, eventually vote for the woman applicant who had prompted his comments.

9 The list was divided into tiers, with a first group of five candidates described as the most qualified, a second group of three candidates as qualified, and then an "also ran" group. Of the thirteen people on the list, only one had a last name denoting non-European ancestry (his ancestry was never confirmed at trial but his resume indicates that he was born in Kansas), and only two were women.

10 The other three were first-time applicants.

11 Retaliation claims are included within this framework. *Miller v. Fairchild Industries, Inc.*, 885 F.2d 498, 504 n. 4 (9th Cir.1989); *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir.1987). As noted in *Ruggles v. California Polytechnic State University*, 797 F.2d 782 (9th Cir.1986), "[r]etaliation is simply one sort of discrimination." *Id.* at 788 n. 1 (Nelson, J., concurring); *see* 42 U.S.C. § 2000e-3(a) (using term "discrimination" to describe retaliation). Most commonly, of course, we rely on the term discrimination as shorthand to describe discrimination on the basis of protected characteristics, while using the term retaliation to describe discrimination on account of an employee's, or potential employee's, opposition to an unlawful employment practice.

12 Since Lam, in her opposition to summary judgment in connection with the first search, focused on discrimination on the basis of protected characteristics rather than retaliation, the district court never specifically addressed the retaliation issue.

Since we conclude that Lam presented sufficient evidence of discriminatory bias to survive summary judgment, we need not rule on the adequacy of her asserted evidence of retaliation. We note, nonetheless, that the district court determined that most members of the faculty believed that Professor A. recused himself from the appointments committee because of Lam's opposition to him, and it found that some faculty members "were outraged that Professor A. had been asked to resign due to possible bias." It would certainly be possible to infer that those faculty members allowed their anger at Professor A.'s forced resignation to shade their consideration of Lam's application.

13 The existence of such third party preferences for discrimination does not, of course, justify discriminatory hiring practices. *See, e.g., Diaz v. Pan Am. World Airways*, 442 F.2d 385, 389 (5th Cir.1971) (holding that customer preference for female flight attendants does not constitute a "bona fide occupational qualification" under Title VII); *cf.* C. Sunstein, *Three Civil Rights Fallacies*, 79 Cal.L.Rev. 751, 760-61 (1991) (economically "rational" discrimination has powerful reinforcing effect on ordinary prejudice).

14 The court stated that summary judgment for defendants would have been inappropriate had Professor A. been allowed to remain as chair.

15 In their argument on this point, the defendants make no distinction between the University's liability and that of the Dean and President (who are both sued in their official capacities).

16 Aside from the difference in gender, it is significant that Lam and the Asian male candidate were of different national origins-Lam being Vietnamese-French, the male candidate, Chinese. Lam alleged not only race discrimination but also national origin discrimination, thereby raising this distinction as relevant under Title VII. Moreover, the particular geographical consciousness of the PALS program means that the distinction might be more salient than it otherwise might be.

17 The district court should have noted, besides the difference in race, the chronological considerations that preclude reliance on this fact to defeat Lam's discrimination claim. The offer of employment to the female applicant was made long after Lam had complained of discrimination both publicly and by filing the present discrimination action. By that time, the Law School was on notice that its employment actions would be subject to scrutiny. Given the obvious incentive in such circumstances for an employer to take corrective action in an attempt to shield itself from liability, it is clear that nondiscriminatory employer actions occurring subsequent to the filing of a discrimination complaint will rarely even be relevant as circumstantial evidence in favor of the employer. *Gonzales v. Police Dept. of San Jose*, 901 F.2d 758, 761-62 (9th Cir.1990).

18 Since the district court is barred from weighing conflicting evidence in ruling on a motion for summary judgment, we need not decide if such evidence might be deemed relevant to, though not determinative of, a claim of race and sex discrimination. We note, nonetheless, that in *Jefferies v. Harris County Community Action Ass'n.*, 615 F.2d 1025 (5th Cir.1980), the Fifth Circuit held that evidence of nondiscriminatory treatment of black males and white females is wholly irrelevant to the question of discrimination against a black female plaintiff claiming bias on both racial and gender grounds. *Id.* at 1034. On the other hand, evidence of *discriminatory* treatment of, for example, a black male clearly is relevant to the discrimination claim of a black woman. *See, e.g., EEOC v. Beverage Canners, Inc.*, 897 F.2d 1067, 1072 (11th Cir.1990). We express no view on whether such a one-way bar is justified in either some or all cases.

19 In essence, the district court's approach reduces discrimination against Asian women to discrimination against Asian men plus discrimination against white women. The inherent fallacy of this approach is obvious when one considers that discrimination against white men could be similarly analyzed, using the same models: Asian men plus white women.

20 See K. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscriminatory Doctrine, Feminist Theory and Antiracist Politics,* 1989 U.Chi.Legal F. 139; J. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981 and the Intersection of Race and Gender in the Civil Rights Act of 1990,* 79 Cal.L.Rev. 775 (1991).

21 *See, e.g.,* J. Hagedorn, *Asian Women in Film: No Joy, No Luck,* Ms., Jan./Feb. 1994, at 74 (listing stereotypes of Asian women such as geisha, dragon lady, concubine, lotus blossom).

22 In *McLaughlin,* we emphasized the *Matsushita* rule's particular relevance to antitrust conspiracy cases (*see* 849 F.2d at 1207), though we note that courts have applied Matsushita's reasoning to other contexts in which economic rationality might safely be presumed. *See, e.g., Knight v. Sharif,* 875 F.2d 516, 523 (5th Cir.1989) (breach of contract); *In re Fortune Sys. Sec. Litigation,* 680 F.Supp. 1360, 1368 (N.D.Cal.1987) (securities fraud). Title VII, by contrast, applies to a very different kind of motivation, so that such cases are inapposite.

23 *See Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 826-27, 106 S.Ct. 1580, 1588, 89 L.Ed.2d 823 (1986); *McLaughlin v. Union Oil Co. of California,* 869 F.2d 1039, 1047 (7th Cir.1989); *Glass v. Pfeffer,* 849 F.2d 1261, 1268 (10th Cir.1988); *Maier v. Orr,* 758 F.2d 1578, 1583 (Fed.Cir.1985).

24 Section 107 of the Civil Rights Act of 1991 modified the rule of *Price Waterhouse.* In cases in which § 107 applies, the employer is liable once the plaintiff shows that a protected characteristic played a motivating part in the employment decision (the employer's proof that the same employment decision would have been made in the absence of the impermissible motive goes only to the issue of relief). *See* 42 U.S.C. §§ 2000e-2(m) & 2000e-5(g)(2)(B)(i). Lam argues that § 107 is applicable here, but we need not decide this issue in light of our holding that Lam did not prove that discrimination or retaliation was a motivating factor in the Law School's decision not to appoint her.

25 As the Court explained in *Price Waterhouse,* the rule that the burden shifts to the employer to prove this affirmative defense does not affect the rule that the plaintiff retains the burden of persuasion regarding discrimination, since these burdens involve two separate and not inconsistent propositions. 490 U.S. at 246 n. 11, 109 S.Ct. at 1788 n. 11.

26 In her brief, Lam states that "the Dean admitted, and [Professor K.] agreed, that Lam was more qualified than a white male finalist in the second search." However, that professor testified only that she "agreed with [the Dean] that [the white male finalist's] file was less strong than *Alison Conner's,*" not Lam's. Although Professor K. was critical of both finalists' qualifications, she never compared their qualifications with Lam's. Similarly, although Professor K. stated that the Dean expressed concern that that finalist's file might be weaker than Lam's, she did not say that the Dean in fact believed that the finalist's file was weaker.

27 Lam presented a variety of evidence in support of her allegations of bias. Most obviously, Lam's absence from every one of the selection lists of the appointments committee members was suspect in light of her strong showing in the first search. Moreover, non-white and foreign-born candidates were conspicuously missing from the final list of candidates prepared in the second search, in contrast to the more diverse origins of candidates considered during the first search.

Additionally, the defendants failed to institute any of the procedural reforms suggested in the aftermath of Lam's original allegations. As we have previously explained, although an employer's violation of its own hiring policies does not constitute a *prima facie* violation of Title VII, it may be circumstantial evidence of discrimination. *Gonzales,* 901 F.2d at 761; *compare Jackson v. Harvard Univ.,* 900 F.2d 464, 465 (1st Cir.) (affirming district court finding of no discrimination in light of "exacting protocol" of tenure decision process, including "prescribed standards" by which to measure candidates), *cert. denied,* 498 U.S. 848, 111 S.Ct. 137, 112 L.Ed.2d 104 (1990)).

Lam also showed evidence that one search committee member was reluctant to hire a woman commercial law professor, although that member did in fact vote in favor of offering the position to a woman.

Finally, Lam presented substantial evidence that, given the Law School's "collegial" atmosphere and corresponding emphasis on consensus, the notoriety of her protest against the school's alleged discrimination was likely to affect her chances of being offered a position there. Certain professors testified that the Dean and the President were strongly opposed to hiring Lam, and that this opposition was known to the Law School faculty. (In her brief, Lam asserts that "two search committee members considered her [oppositional] activities in rejecting her application," implying that their view of her activities affected their consideration of her application. However, of the two professors cited, one was not on the second search committee, and the other stated that his view of Lam's activities would not have affected his judgment on the merits of her application.)

Accordingly, the court's assertion that "no evidence has been adduced to point even to an inference of discriminatory or retaliatory motives on the part of the second search committee members in the selection of recommended candidates" (Finding of Fact and Conclusions of Law, at 14) is clearly erroneous. The above-described circumstantial evidence certainly supports an *inference* of discriminatory/retaliatory intent. It does not, however, necessitate the conclusion that the defendants' failure to appoint Lam was based on impermissible motivations. As we have emphasized, it often requires a searching factual inquiry to ascertain the motivations for a hiring decision, a difficult task that is exacerbated when multiple decisionmakers are involved. Here, over the course of a five-day bench trial, the district court heard testimony from a variety of sources, including Lam, each of the members of the search committee, various Law School faculty members, and the Dean. The search committee members uniformly stated that

their decisions were not motivated by impermissible bias; the court, assessing their credibility and exercising its judgment, chose to believe them. We cannot say that the court clearly erred in doing so.

28 We note, in addition, that substantial evidence was adduced regarding faculty uncertainty as to the goals of the PALS program and the desirable attributes of its director. In particular, there was a good deal of debate in the faculty regarding whether a "public law" or "private law" emphasis was preferable. As a result, therefore, of the two years intervening between the first and second searches, Lam may have appeared a less attractive candidate to the 1989-90 search committee members.

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930 F.2d 1434
United States Court of Appeals, Ninth Circuit.

Michelle LINDAHL, Plaintiff-Appellant,
v.
AIR FRANCE, a French Corporation, Defendant-Appellee.

No. 89-55936. | Argued and Submitted Feb. 11, 1991. | Decided April 22, 1991.

A 49-year-old female airline employee sued airline for sex discrimination under Title VII and age discrimination under ADEA for giving promotion to younger male instead of to her. The United States District Court for the Central District of California, Edward Rafeedie, J., granted summary judgment for airline and employee appealed. The Court of Appeals, Rymer, Circuit Judge, held that employee raised factual questions material to demonstrating that airline's proffered explanations for promoting male employee were not credible and that discrimination was more likely explanation.

Reversed and remanded.

West Headnotes (10)

[1] **Federal Courts**
Trial De Novo

District court's decision to grant summary judgment in employment discrimination case was reviewed de novo.

17 Cases that cite this headnote

[2] **Civil Rights**
Sex Discrimination
Civil Rights
Age Discrimination

Employee suing for age and sex discrimination in violation of Title VII and the ADEA must carry initial burden of establishing prima facie case of discrimination. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

7 Cases that cite this headnote

[3] **Civil Rights**
Sex Discrimination
Civil Rights
Age Discrimination

Employee suing for sex and age discrimination in violation of Title VII and ADEA can establish prima facie case by showing, for example, that she belongs to protected group, that she applied for and was qualified for job that was open for applications, that she was rejected, and that the position remained opened after her rejection and employer continued to seek applicants from persons of employee's qualifications. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

9 Cases that cite this headnote

[4] **Civil Rights**
Effect of Prima Facie Case; Shifting Burden

When employee establishes prima facie case of discrimination in denial of a promotion, burden shifts to employer to articulate some legitimate, nondiscriminatory reason for employee's rejection, and, at that point, burden shifts back to employee to show that employer's reason was pretext for discrimination. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

25 Cases that cite this headnote

[5] **Civil Rights**
Motive or Intent; Pretext

Employee must carry burden of showing that employer's reason for denial of promotion was pretext for discrimination either directly by persuading the court that discriminatory reason more likely motivated the employer or indirectly by showing that employer's proffered explanation is unworthy of credence. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

38 Cases that cite this headnote

[6] **Civil Rights**
Disparate Treatment

Disparate treatment claims under ADEA are analyzed by same standard used to analyze disparate treatment claims under Title VII. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5 Cases that cite this headnote

[7] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Employee suing for age and sex discrimination cannot defeat summary judgment simply by making out prima facie case. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

27 Cases that cite this headnote

[8] **Civil Rights**
Presumptions, Inferences, and Burden of Proof

While a prima facie case in suit for employment discrimination raises inference of discrimination, when employer produces legitimate, nondiscriminatory reasons for the employment decision, inference of a discrimination is rebutted. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

10 Cases that cite this headnote

[9] **Civil Rights**
Weight and Sufficiency of Evidence

Employment discrimination plaintiff's burden of establishing that employer's proffered reason for employment decision is pretextual cannot be carried simply by restating the prima facie case and expressing intent to challenge credibility of employer's witnesses on cross-examination; employee must produce specific facts either directly evidencing discriminatory motive or showing that employer's explanation is not credible. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

107 Cases that cite this headnote

[10] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

A 49-year-old female airline employee raised factual questions material to demonstrating that airline's proffered explanations for promoting younger male employee were not credible and that discrimination was more likely explanation, precluding summary judgment. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

22 Cases that cite this headnote

Attorneys and Law Firms

*1435 William John Kennedy, Darling, Hall & Rae, Los Angeles, Cal., for plaintiff-appellant.

J. Jay Rakow, Christensen, White, Miller, Fink & Jacobs, Los Angeles, Cal., John K. Weir, Haight, Gardner, Poor & Havens, New York City, for defendant-appellee.

Appeal from the United States District Court for the Central District of California.

Before BOOCHEVER, HALL and RYMER, Circuit Judges.

Opinion

RYMER, Circuit Judge:

Michelle Lindahl brought this suit against her employer, Air France, for sex discrimination under Title VII of the Civil Rights Act of 1964 and age discrimination under the Age Discrimination in Employment Act (ADEA) based on Air France giving a promotion to a young male instead of to her, a 49-year-old female. The district court granted Air France's motion for summary judgment. We reverse.

***1436 I**

Lindahl worked as a Customer Promotion Agent in Air France's Los Angeles office. The office had two groups of employees to handle sales activities, Customer Promotion Agents and Sales Representatives. Sales Representatives worked mostly in the field promoting sales, while the Customer Promotion Agents worked inside, providing backup to the Sales Representatives.

In 1982, the District Manager, Karl Kershaw, told the Customer Promotion Agents that Air France was planning to create a new position of Senior Customer Promotion Agent and invited all of them to apply for the position. After considering their qualifications, Kershaw told Lindahl that she was the most qualified and would be given the promotion. Subsequently, however, Air France decided not to create the position, and Lindahl did not get the promotion.

In 1987, without any prior notification to the Customer Promotion Agents, Kershaw announced that he had chosen Edward Michels to fill a new Senior Customer Promotion Agent position. At that time, there were four eligible candidates: two women over age 40 (including Lindahl), and two men under age 40 (including Michels).

Lindahl, upset about the decision, decided to pursue Air France's grievance procedure. First, she asked Kershaw to give an explanation. After about six weeks, he responded that Michels had the "best overall qualifications." Unsatisfied, she wrote to Regional Manager Robert Watson. Watson responded by affirming Kershaw's decision. Finally, Lindahl had her attorney take her grievance to Personnel Services Manager Eugene Carrara. At this time, she made clear that she felt that the decision was the product of age and sex discrimination. Carrara held a hearing and decided to reject her claim because he believed the promotion decision was reasonable. In his decision, he stated that Michels's computer expertise was the principal reason for selecting him.

While the grievance proceeding was pending, Kershaw apparently became dissatisfied with the new organization of the group, and Watson suggested a reorganization to General Manager USA, Jean-Claude Baumgarten, that would have put Michels in a purely technical function and would have created another Senior Customer Promotion Agent position to deal with sales backup. The new position would have gone to Lindahl, but Baumgarten rejected the proposal.

Lindahl then filed claims with the California Department of Fair Employment and Housing and with the federal Equal Employment Opportunity Commission (EEOC). After exhausting her administrative remedies, she filed suit in the district court, alleging age and sex discrimination under 29 U.S.C. §§ 623, 631 (ADEA) (prohibiting age discrimination against individuals over age 40) and 42 U.S.C. § 2000e-2(a) (Title VII) (prohibiting sex discrimination). Air France moved for summary judgment on both causes of action.

The district court granted summary judgment on the ground that Lindahl had not raised a genuine issue of material fact as to whether Air France's legitimate, nondiscriminatory explanations are pretexts for discrimination. Lindahl filed a Rule 59(e) motion to alter, amend, and vacate the judgment, which the district court denied. She now appeals.

II

[1] We review the district court's decision to grant summary judgment de novo. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir.1989), *cert. denied,* 496 U.S. 937, 110 S.Ct. 3217, 110 L.Ed.2d 664 (1990).

A

Summary judgment is proper if no factual issues exist for trial. The party opposing summary judgment must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, and that the dispute is genuine, i.e., the

evidence is such that a reasonable jury could return a verdict for the nonmoving party. ***1437** *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

The evidence of the opposing party is to be believed, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in the light most favorable to the nonmoving party. *Id.* at 255, 106 S.Ct. at 2513. However, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts.... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (citations omitted) (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968)).

[2] [3] Lindahl argues that Air France's decision to promote Michels was disparate treatment on the basis of sex and age in violation of Title VII and the ADEA.1 The Supreme Court established the allocation of proof in Title VII cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The plaintiff "must carry the initial burden under the statute of establishing a prima facie case of ... discrimination." *Id.* at 802, 93 S.Ct. at 1824. The plaintiff can establish a prima facie case by showing, for example, that she belongs to a protected group, that she applied and was qualified for a job which was open for applications, that she was rejected, and that the position remained open after her rejection and the employer continued to seek applicants from persons of the plaintiff's qualifications. *Id.; see also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 n. 6, 101 S.Ct. 1089, 1094 n. 6, 67 L.Ed.2d 207 (1981) (explaining that the *McDonnell Douglas* formulation is flexible and can be adapted to fit the facts of each case).

[4] [5] [6] "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824. At that point, the burden shifts back to the plaintiff to show that the employer's reason was a pretext for discrimination. *Id.* at 804, 93 S.Ct. at 1825. The plaintiff may carry this burden "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095. Disparate treatment claims under the ADEA "are analyzed by the same standard used to analyze disparate treatment claims under Title VII." *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1436 (9th Cir.1990).

Lindahl contends that once she has made out a prima facie case of discrimination, summary judgment is necessarily improper. She reasons that the prima facie case raises an inference of discrimination, and because on summary judgment all inferences must be resolved in her favor, she need not produce any additional evidence of pretext to defeat summary judgment.

[7] [8] We have made clear that a plaintiff cannot defeat summary judgment simply by making out a prima facie case. *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir.1983). It is true that the prima facie case raises an inference of discrimination. *Burdine*, 450 U.S. at 254, 101 S.Ct. at 1094. However, when the employer produces legitimate, nondiscriminatory reasons for the employment decision, the inference of discrimination is rebutted. *Id.* at 255, 101 S.Ct. at 1094. "[T]he defendant's articulation of a legitimate nondiscriminatory reason serves ... to shift the burden back to the plaintiff to raise a genuine factual question as to whether the proffered reason is pretextual." *Lowe v. City of Monrovia*, 775 F.2d 998, 1008 (9th Cir.1985), *amended*, 784 F.2d 1407 (1986).

[9] The plaintiff cannot carry this burden simply by restating the prima facie ***1438** case and expressing an intent to challenge the credibility of the employer's witnesses on cross-examination. She must produce specific facts either directly evidencing a discriminatory motive or showing that the employer's explanation is not credible. *See Steckl*, 703 F.2d at 393. Still, because of the inherently factual nature of the inquiry, the plaintiff need produce very little evidence of discriminatory motive to raise a genuine issue of fact.

[A]ny indication of discriminatory motive ... may suffice to raise a question that can only be resolved by a factfinder. Once a *prima facie* case is established ..., summary judgment for the defendant will ordinarily not be appropriate on any ground relating to the merits because the crux of a Title VII dispute is the "elusive factual question of intentional discrimination."
Lowe, 775 F.2d at 1009 (quoting *Burdine*, 450 U.S. at 255 n. 8, 101 S.Ct. at 1094 n. 8).

B

The district court concluded, and the parties do not dispute, that Lindahl made out a prima facie case of discrimination. She is a woman over age 40 who, in effect, applied for a promotion, was qualified for it, but lost it to a man under age 40. The parties also do not dispute that Air France met its burden of producing legitimate, nondiscriminatory reasons for promoting Michels and not Lindahl. Air France

points to the deposition testimony of Watson and Kershaw, indicating that their reasons for promoting Michels were (1) his computer proficiency, and (2) his leadership abilities as they related to Air France's need to establish order, rules, and regulations in a chaotic office.

[10] The issue on appeal is therefore whether Lindahl raised a genuine issue of material fact as to pretext. We believe Lindahl has raised factual questions material to demonstrating that Air France's explanations are not credible and that discrimination was the more likely explanation for Michels's promotion.2

As to Air France's explanation that Michels was chosen for his computer proficiency, Lindahl argues that it is not credible because neither Kershaw nor Watson (the ones most closely associated with the decision) mentioned it as the reason for choosing Michels. Kershaw had said only that Michels had "the best overall qualifications to lead the group," and Watson had simply affirmed Kershaw's decision. The computer explanation did not come out until Personnel Services Manager Carrara, who was not involved with the decision, mentioned it four months later in response to a letter from Lindahl's attorney.

Simply because an explanation comes after the beginning of litigation does not make it inherently incredible. *Merrick,* 892 F.2d at 1438. Nevertheless, in this case, the computer explanation would have been such a straightforward answer to Lindahl's inquiries that one might expect that Kershaw and Watson would have mentioned it if it really were the explanation. That they instead gave vague explanations about "overall qualifications" might suggest that the computer explanation was a later fabrication.

Moreover, computer expertise was not clearly related to the leadership position. Indeed, computer proficiency had never been listed as a qualification for the position of Senior Customer Promotion Agent. While Michels's computer knowledge might have been helpful to Air France generally, it is not clear that it made him a better candidate to lead the Customer Promotion Group.

Lindahl also challenges the credibility of Air France's explanation that Michels was chosen for his leadership abilities. Kershaw testified in his deposition that "being accepted" is an important part of being a leader, but he admitted that Michels "was not well liked by the group." By contrast, Kershaw described Lindahl as having "a good relationship with the staff."

Lindahl also stated that Michels was preoccupied with the computer and neglected his duties backing up the Sales Representatives ***1439** and that these backup duties were traditionally part of the Customer Promotion Group's responsibilities. Finally, the record shows that Michels was the most junior member of the Customer Promotion Group.

All of these facts tend to show that Michels may not have been the best person to lead the group, and they therefore suggest that leadership ability may not have been the real reason for choosing Michels over Lindahl. *See Williams v. Edward Apffels Coffee Co.,* 792 F.2d 1482, 1487 (9th Cir.1986) (choosing inexperienced candidates can raise question about motives). *But see Cotton v. City of Alameda,* 812 F.2d 1245, 1249 (9th Cir.1987) (experience is not sole criterion employer may use to determine qualifications).

Moreover, even if Kershaw did make his decision based on leadership abilities, other evidence could suggest that his evaluation of leadership ability was itself sexist. Lindahl points out that Kershaw made statements about the candidates' relative qualifications that reflect male/female stereotypes. Kershaw testified in his deposition that he believed that both female candidates get "nervous" and that the other female candidate "gets easily upset [and] loses control." By contrast, Kershaw described Michels's leadership qualities as "not to back away from a situation, to take hold immediately of the situation, to attack the situation right away, to stay cool throughout the whole process." He went on to comment that "sitting and griping and getting emotional is not contributing to, No. 1, getting the job done, number two, to the morale and atmosphere of the group."

The Supreme Court has made clear that sex stereotyping can be evidence of sex discrimination, especially when linked to the employment decision. *Price Waterhouse v. Hopkins,* 490 U.S. 228, 250-52, 109 S.Ct. 1775, 1790-92, 104 L.Ed.2d 268 (1989). Kershaw apparently saw Michels as aggressive and cool (in addition to being the one who could impose order), while he saw the female candidates as nervous and emotional. His comments could suggest that Kershaw made his decision on the basis of stereotypical images of men and women, specifically that women do not make good leaders because they are too "emotional."

Finally, Lindahl points to evidence showing that Air France handled the promotion decision differently when only women were eligible than when young men were eligible. In 1982, when the possibility of an opening for Senior Customer Promotion Agent position first arose, the only eligible candidates for the position were women. Kershaw told all of them about the possible opening and that they would have to take a test. Air France abandoned the idea to add the position. In 1987, two men under age 40 and two women over age 40 were eligible. Kershaw did not tell the candidates about the position, and Michels got the

promotion without taking a test or having an interview. This difference in treatment might further support an inference that Air France was discriminating against older women.

While not overwhelming, Lindahl's evidence of discriminatory motive is sufficient to raise a genuine issue of fact. She has pointed to facts that could call into question the credibility of Air France's nondiscriminatory explanations and could suggest discriminatory motives. Whether the facts do indicate discrimination is a question that should ordinarily be resolved by a factfinder, and we believe it is possible that a reasonable trier of fact could find that Air France discriminated against Lindahl in promoting Michels. We therefore conclude that summary judgment should not have been granted.3

REVERSED AND REMANDED.

Parallel Citations

55 Fair Empl.Prac.Cas. (BNA) 1033, 56 Empl. Prac. Dec. P 40,712, 59 USLW 2726

Footnotes

1 Lindahl could also show illegal discrimination by demonstrating sufficient disparate impact. Although she presented this theory to the district court, she has not argued it in her brief and has therefore abandoned this claim on appeal.

2 Because we would reach the same conclusion whether the case would be tried by a judge or a jury, we do not reach the issue of whether 28 U.S.C. § 1330 precludes a jury trial in this case.

3 Lindahl also argues that the district court erred in concluding that she was barred from raising a claim for retaliation for the first time in her opposition to summary judgment. Her retaliation theory is that General Manager Baumgarten rejected the reorganization proposal that would have given her a promotion in order to get back at her for bringing discrimination charges. The district court did not consider the merits of the claim because it was not raised in the EEOC complaint or in the federal court complaint.
In light of our disposition, we need not reach this issue. We express no opinion as to whether leave to amend might be appropriate, whether the issue may be preserved in the pre-trial order, or whether the facts have evidentiary significance.

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775 F.2d 998
United States Court of Appeals, Ninth Circuit.

Kathryn LOWE, Plaintiff-Appellant,
v.
CITY OF MONROVIA, Paul Stuart, Robert Bartlett, Monrovia City Council, John Nobrega, Mary Wilcox, Ed Zoolalian, Robert Ovrom and Betty Logans, Defendants-Appellees.

No. 84-5960. | Argued and Submitted March 4, 1985. | Decided Oct. 30, 1985. | As Amended Dec. 26, 1985 and Jan. 21, 1986.

Unsuccessful applicant for position of city police officer brought civil rights action against city and city officials, alleging that defendants' failure to hire her was result of discrimination on basis of race and sex. The United States District Court for the Central District of California, Cynthia Holcomb Hall, J., granted city's motion for summary judgment, and plaintiff appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that evidence raised material issue of fact as to whether city's motivation in failing to hire plaintiff was based on race, precluding summary judgment.

Affirmed in part, reversed in part and remanded.

Schwarzer, District Judge, sitting by designation, filed opinion dissenting in part.

West Headnotes (27)

[1] **Civil Rights**
Exhaustion of Administrative Remedies Before Resort to Courts

When plaintiff fails to raise Title VII claim before the Equal Employment Opportunity Commission, district court lacks subject matter jurisdiction to hear it. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

21 Cases that cite this headnote

[2] **Federal Courts**
Objections to Jurisdiction, Determination and Waiver

Except where jurisdictional issue requires determination of facts relevant to merits of the dispute, district court is ordinarily free to hear evidence regarding jurisdiction, and to rule on that issue prior to trial, resolving factual disputes where necessary.

[3] **Federal Courts**
Particular Issues and Questions

When case is dismissed for lack of subject matter jurisdiction, clearly erroneous standard in reviewing district court's underlying factual findings is applied.

3 Cases that cite this headnote

[4] **Federal Courts**
Definite and Firm Conviction of Mistake

Under clearly erroneous standard, Court of Appeals accepts district court's findings of fact unless upon review it is left with definite and firm conviction that mistake has been made.

4 Cases that cite this headnote

[5] **Civil Rights**
Particular Cases

Applicant for city police officer position was barred from bringing Title VII sex discrimination claim in district court where she failed to first file such claim with Equal Employment Opportunity Commission. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

19 Cases that cite this headnote

[6] **Civil Rights**
Presumptions, Inferences, and Burden of Proof

In order to prevail in a Title VII case on disparate impact theory, plaintiff must show that business practice, neutral on its face, has a substantial adverse impact on group protected by Title VII; once plaintiff establishes prima facie case of disparate impact, burden shifts to defendant to show that practice is justified by business necessity. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

32 Cases that cite this headnote

[7] **Civil Rights**
Presumptions, Inferences, and Burden of Proof

Under Title VII of Civil Rights Act of 1964, a "disparate impact" plaintiff, unlike plaintiff proceeding on a "disparate treatment" theory, may prevail without proving intentional discrimination. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

[8] **Civil Rights**
Prima Facie Case

Allegations of unsuccessful applicant for city police officer position that city's use of eligibility lists with delayed effective dates which expired automatically, combined with practice of lateral hiring resulted in disproportionately low number of job offers to Blacks were insufficient to establish prima facie case of disparate impact under Title VII, absent affidavits or documentary evidence sufficient to support her claim. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

10 Cases that cite this headnote

[9] **Civil Rights**
Effect of Prima Facie Case; Shifting Burden

If plaintiff establishes prima facie case of discrimination in Title VII disparate treatment case, burden then shifts to defendant to articulate nondiscriminatory reason for its employment decision; then, in order to prevail, plaintiff must demonstrate that employer's alleged reason for adverse employment decision is pretext for another motive which is discriminatory. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

155 Cases that cite this headnote

[10] **Civil Rights**
Presumptions, Inferences, and Burden of Proof

Availability of Title VII discriminatory treatment claim is not dependent on plaintiff's ability to prove discriminatory impact claim; as long as plaintiff can establish individual case of intentional discrimination, there is no need to show that employer has also discriminated against an entire class. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

97 Cases that cite this headnote

[11] **Civil Rights**
Presumptions, Inferences, and Burden of Proof

To establish prima facie case of discrimination in disparate treatment case, plaintiff must offer evidence that gives rise to inference of unlawful discrimination. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to

2000e-17.

51 Cases that cite this headnote

[12] **Civil Rights**
Presumptions, Inferences, and Burden of Proof

Common way to establish inference of discrimination in Title VII disparate treatment case is to show that four requirements are met: that plaintiff belongs to class protected by Title VII; that plaintiff applied and was qualified for job for which employer was seeking applicants; that, despite being qualified, plaintiff was rejected; and that, after plaintiff's rejection, position remained open and employer continued to seek applicants from persons of comparable qualifications. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

12 Cases that cite this headnote

[13] **Civil Rights**
Prima Facie Case

Evidence that unsuccessful applicant for city police officer position was qualified, that position was open when she filed her application, and that city continued to accept applications from similarly qualified candidates after eligibility list upon which applicant's name appeared expired was sufficient to establish prima facie case of race discrimination under Title VII, despite evidence that position was no longer open when the eligibility list became effective, and that no openings occurred during period list was effective. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

6 Cases that cite this headnote

[14] **Civil Rights**
Prima Facie Case

Evidence that applicant for city police officer position was told that she should apply in Los Angeles, and that no Blacks were employed by city police department at the time was sufficient to create inference of discrimination sufficient to establish prima facie case of employment discrimination. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

2 Cases that cite this headnote

[15] **Federal Civil Procedure**
Burden of Proof

On motion for summary judgment in Title VII disparate treatment case, defendant's articulation of legitimate nondiscriminatory reason for its employment decision serves only to shift burden back to plaintiff to raise genuine factual question as to whether proffered reason is pretextual. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

40 Cases that cite this headnote

[16] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

In Title VII disparate treatment case, evidence that applicant for city police officer position was told that she should apply in Los Angeles because the Los Angeles police force was "literally begging for minorities and especially females" raised genuine issue of material fact with respect to whether city's reasons or motivations in failing to hire her were in fact discriminatory, precluding summary judgment. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

12 Cases that cite this headnote

[17] **Federal Civil Procedure**

Proceedings in Which Judgment Is Authorized

When Title VII plaintiff has presented sufficient facts to meet his burden with respect to prima facie aspect of employment discrimination case, summary judgment for defendant will ordinarily not be appropriate on any ground relating to the merits. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

6 Cases that cite this headnote

[17] **Federal Civil Procedure**
Proceedings in Which Judgment Is Authorized

Once Title VII plaintiff has established prima facie employment discrimination case, summary judgment for defendant will ordinarily not be appropriate on any ground relating to the merits. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

5 Cases that cite this headnote

[18] **Civil Rights**
Public Employment

Unsuccessful applicant for city police officer position could not bring sex discrimination claim under 42 U.S.C.A. § 1981, since that section redresses only discrimination based on race.

5 Cases that cite this headnote

[19] **Civil Rights**
Employment Practices
Civil Rights
Existence of Other Remedies; Exclusivity

Title VII of Civil Rights Act of 1964 and 42 U.S.C.A. § 1981 are overlapping but independent remedies for racial discrimination in employment. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

4 Cases that cite this headnote

[20] **Civil Rights**
Employment Practices
Civil Rights
Presumptions, Inferences, and Burden of Proof

Claims of disparate treatment arising under Title VII of Civil Rights Act of 1964 and 42 U.S.C.A. § 1981 are parallel because both require proof of intentional discrimination; same standards are used to prove both claims, and facts sufficient to give rise to one are sufficient to give rise to the other. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

13 Cases that cite this headnote

[21] **Civil Rights**
Presumptions, Inferences, and Burdens of Proof

Plaintiff suing under 42 U.S.C.A. § 1981 may prevail only by establishing intentional discrimination, i.e., disparate treatment; proof of disparate impact is insufficient.

2 Cases that cite this headnote

[22] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Evidence that unsuccessful applicant for city police officer position was told to apply in Los Angeles because the Los Angeles police force was "literally begging for minorities and especially females" raised material issue of fact as to whether city's hiring procedures discriminated on basis of race, precluding summary judgment. 42 U.S.C.A. § 1981.

4 Cases that cite this headnote

|23| **Federal Civil Procedure**
⇐Employees and Employment Discrimination, Actions Involving

Evidence that unsuccessful applicant for city police officer position was told that she should apply for position in Los Angeles because the Los Angeles police department was "literally begging for minorities and especially females" raised material issue of fact as to whether city purposefully discriminated against her because of her race and sex, precluding summary judgment on her claim under 42 U.S.C.A. § 1983.

6 Cases that cite this headnote

|24| **Civil Rights**
⇐Good Faith and Reasonableness; Knowledge and Clarity of Law; Motive and Intent, in General

Government officials are entitled to qualified immunity only if reasonable person would not have been aware that actions at issue violated well-established statutory or constitutional rights.

6 Cases that cite this headnote

|25| **Civil Rights**
⇐Municipalities and Counties and Their Officers

Whether city employees are immune turns on objective reasonableness of their conduct in light of clearly established law, not under subjective good faith.

4 Cases that cite this headnote

|26| **Civil Rights**
⇐Employment Practices

City officials were not shielded from liability under 42 U.S.C.A. §§ 1981 and 1983 with respect to alleged discriminatory hiring practice in city police department, since reasonable person would have been aware that practices complained of were unlawful.

Attorneys and Law Firms

***1001** Charles B. Johnson, Pasadena, Cal., for plaintiff-appellant.

Melanie Poturica, Los Angeles, Cal., for defendants-appellees.

***1002** Appeal from the United States District Court for the Central District of California.

Before PREGERSON and REINHARDT, Circuit Judges, and SCHWARZER,* District Judge.

Opinion

REINHARDT, Circuit Judge:

Kathryn Lowe, a Black woman, brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982), alleging that the failure by the City of Monrovia ("the City") and the individual defendants to hire her for a position on the City's police force resulted from discrimination on the basis of race and sex. Lowe also sought relief under 42 U.S.C. § 1981 (1982) and 42 U.S.C. § 1983 (1982) for the City's alleged discriminatory employment acts. The district court granted the City's motion for summary judgment, ruling that Lowe could not establish a *prima facie* case of discrimination because she was not rejected during the effective dates of the employment eligibility list on which her name was placed. We reverse.

I. BACKGROUND

The City of Monrovia hires both inexperienced recruits and experienced officers ("lateral hires") to fill entry-level police officer vacancies. The City accepts applications for entry-level police officers at all times, even when no openings exist. After receiving applications from recruits,

the City requires these candidates to pass both a written and an oral examination. Applicants who pass both tests are placed on an eligibility list. They are ranked on the list according to their scores. The eligibility list, however, does not become effective until a designated later date. Once a list does become effective, it remains in effect for six months. According to the City, when openings occur, positions are offered to the applicants on the then active "Entry Level Police Officer" list in the order of their rank on that list. The City also maintains a list of lateral entry candidates, although it is not clear how that list is compiled. Nor is it clear when the City hires laterally for an available entry-level position instead of offering the position to an eligible recruit applicant. It does appear, however, that most entry-level positions are filled by recruits rather than experienced officers.

Kathryn Lowe, an inexperienced graduate of a police officer training program, applied for an entry-level police officer position on the Monrovia police force in January 1982. At that time there were no women or Blacks on the police force.

There is no dispute that an opening actually existed for an entry-level police officer when Lowe applied. The City contends, however, that although an opening existed and although she was qualified, Lowe never became eligible to fill that opening. Lowe passed both the written and the oral examinations by May 28, 1982 and was notified on June 3, 1982 that she had been accepted for the eligibility list. Nevertheless, according to the City, the list that contained her name did not become effective until August 1, 1982 and the opening that existed when Lowe first applied was filled prior to that date. According to the City, Lowe was not eligible for employment after February 1, 1983 because the list on which her name appeared automatically expired on that date. It is undisputed that there was no opening for an entry-level police officer at any time between August 1, 1982 and February 1, 1983.

Lowe claims that during her oral examination, Betty Logans, Personnel Division Manager for Monrovia, told her that the City's police force had no women and no Blacks and it "[had] no facilities." Logans suggested that Lowe apply for a position in Los Angeles where the police department is "literally begging for minorities and especially ***1003** females."[1] Citing that statement, Lowe filed a complaint against the City with the EEOC on June 18, 1982. On June 7, 1982, prior to the effective date of Lowe's eligibility list but after Lowe had been notified that she had qualified for placement on the list, Louis Razo was hired laterally for an entry-level police officer position. Lowe amended her EEOC complaint on June 24, 1982 to include that information.

After receiving a right-to-sue letter from the EEOC, Lowe brought this suit. Her complaint alleged three independent causes of action. The first cause of action, brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982), alleged discrimination for failure to hire Lowe as a police officer based on her race and her sex.[2] The second cause of action, brought under 42 U.S.C. § 1981 (1982), alleged that Lowe's right to contract for her personal services as a police officer on a basis equal to other persons was denied to her because of her race and sex. The third cause of action, brought under 42 U.S.C. § 1983 (1982), alleged that Lowe was denied employment based on her race and sex in violation of the equal protection clause of the fourteenth amendment.

II. STANDARD OF REVIEW

|1| |2| |3| |4| The district court found that Lowe was barred from bringing an action for sex discrimination pursuant to Title VII because she failed to file a complaint for sex discrimination with the EEOC. When a plaintiff fails to raise a Title VII claim before the EEOC, the district court lacks subject matter jurisdiction to hear it. *Shah v. Mt. Zion Hospital and Medical Center,* 642 F.2d 268, 271-72 (9th Cir.1981). Except where the jurisdictional issue requires a determination of facts relevant to the merits of the dispute, a district court "is ordinarily free to hear evidence regarding jurisdiction, and to rule on that issue prior to trial, resolving factual disputes where necessary." *Augustine v. United States,* 704 F.2d 1074, 1077 (9th Cir.1983). When a case is dismissed for lack of subject matter jurisdiction, we apply the clearly erroneous standard in reviewing the district court's underlying factual findings. Under that standard, we accept the district court's findings of fact unless upon review we are left with the definite and firm conviction that a mistake has been made. *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 541-42, 92 L.Ed. 746 (1948); *Bohemia, Inc. v. Home Insurance Co.,* 725 F.2d 506, 509 (9th Cir.1984).

The district court disposed of the remainder of Lowe's claims, including the Title VII race discrimination claim, by granting the defendants' motion for summary judgment. We review a grant of summary judgment *de novo, Lojek v. Thomas,* 716 F.2d 675, 677 (9th Cir.1983), and like the trial court, we are governed by the standard set forth in Federal Rule of Civil Procedure 56(c), *Twentieth Century-Fox Film Corp. v. MCA,* 715 F.2d 1327, 1328 (9th Cir.1983). We must determine whether, viewing the facts and the law in the light most favorable to the nonmoving party, there is any genuine issue of material fact and whether the substantive law was correctly applied. *Amaro*

v. Continental Can Co., 724 F.2d 747, 749 (9th Cir.1984); *Lojek*, 716 F.2d at 677; Fed.R.Civ.P. 56(c).

III. THE TITLE VII CLAIMS

A. *Sex Discrimination*

[5] When determining that Lowe's Title VII sex discrimination claim was jurisdictionally barred, the district court considered Lowe's amended EEOC complaint. In contrast to the initial complaint she filed ***1004** with that agency, Lowe's amended EEOC complaint explicitly states: "I feel the sole reason for my denial of the job is because I am Black." The amended complaint does not allege discrimination on the basis of sex. Because the district court correctly found that Lowe did not file a sex discrimination claim with the EEOC, we affirm its dismissal of the Title VII sex discrimination charge.

B. *Disparate Impact on the Basis of Race*

[6] Lowe alleges that the City's policy of using eligibility lists that have delayed effective dates and that expire automatically, along with its reliance on lateral-hire employees to fill entry-level positions, has a disparate impact on Blacks. In order to prevail in a Title VII case on a disparate impact theory, a plaintiff must show that a business practice, neutral on its face, has a substantial adverse impact on a group protected by Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). Once the plaintiff establishes a *prima facie* case of disparate impact, the burden shifts to the defendant to show that the practice is justified by "business necessity." *Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531, 537 (9th Cir.1982); *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1275-80 (9th Cir.1981). The district court concluded that Lowe failed to establish a *prima facie* case of disparate impact. We agree.

[7] A "disparate impact" plaintiff, unlike a plaintiff proceeding on a "disparate treatment" theory, may prevail without proving intentional discrimination. *American Federation of State, County, and Municipal Employees (AFSCME) v. Washington*, 770 F.2d 1401, 1405 (9th Cir.1985); *Gay*, 694 F.2d at 537. However, the requirements a disparate impact plaintiff must meet "are in some respects more exacting than those of a disparate treatment case. A disparate impact plaintiff 'must not merely prove circumstances raising an inference of discriminatory impact; he must prove the discriminatory impact at issue.' " *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482 (9th Cir.1983) (citing *Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750, 753 (5th Cir.1981), *cert. denied*, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982)). This is usually done by establishing "that an employment practice selects members of a protected class in a proportion smaller than their percentage in the pool of actual applicants." *Id.*

[8] Lowe does not question the validity of the tests that are used to rank the applicants on the eligibility lists. Rather, she claims that the use of eligibility lists that have delayed effective dates and that expire automatically, combined with the practice of lateral hiring, has a disparate impact on Blacks. She contends that these practices, regardless of the City's motivation, result in a disproportionately low number of job offers to Blacks.

Assuming arguendo that Lowe asserted a cognizable disparate impact claim, her claim did not survive the City's motion for summary judgment. Lowe did not offer affidavits or documentary evidence sufficient to support her claim; her assertions are made primarily in memoranda of law, not by way of proferred facts.3 Thus, the district court correctly concluded that Lowe failed to establish a *prima facie* case of disparate impact.

C. *Disparate Treatment on the Basis of Race*

[9] [10] Lowe also contends that the City *intentionally* discriminated against her and that she is therefore entitled to proceed under Title VII on a disparate treatment theory.4 In a Title VII disparate ***1005** treatment case, a plaintiff must first establish a *prima facie* case of discrimination. If the plaintiff establishes a *prima facie* case, the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its employment decision. Then, in order to prevail, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 93 S.Ct. 1817, 1824-26, 36 L.Ed.2d 668 (1973); *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1358-59 (9th Cir.1985).

1. *The Prima Facie Case*

[11] [12] To establish a *prima facie* case of discrimination in a disparate treatment case, a plaintiff must offer evidence that "give[s] rise to an inference of unlawful discrimination." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981); *accord United States Postal Service v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 1481, 75 L.Ed.2d

403 (1983). A common way to establish an inference of discrimination is to show that the four requirements set forth in *McDonnell Douglas* are met:

> 1. that the plaintiff belongs to a class protected by Title VII;
>
> 2. that the plaintiff applied and was qualified for a job for which the employer was seeking applicants;
>
> 3. that, despite being qualified, the plaintiff was rejected; and
>
> 4. that, after the plaintiff's rejection, the position remained open and the employer continued to seek applicants from persons of comparable qualifications.

See McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1824. Satisfaction of the *McDonnell Douglas* criteria is sufficient to establish a *prima facie* case. *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 575, 98 S.Ct. 2943, 2948-49, 57 L.Ed.2d 957 (1978); *Diaz,* 752 F.2d at 1359; *Spaulding v. University of Washington,* 740 F.2d 686, 700 (9th Cir.), *cert. denied,* --- U.S. ----, 105 S.Ct. 511, 83 L.Ed.2d 401 (1984); *O'Brien v. Sky Chefs, Inc.,* 670 F.2d 864, 868 n. 1 (9th Cir.1982); *Lynn v. Regents of the University of California,* 656 F.2d 1337, 1340-41 (9th Cir.1981); *White v. City of San Diego,* 605 F.2d 455, 458 (9th Cir.1979).

[13] As a Black, Lowe belongs to a class protected by Title VII. Both parties agree that she was qualified for the position because she passed the examination and that at some point she was rejected. Thus there is no disagreement that Lowe met the first and third parts of the *McDonnell Douglas* requirements for establishing a *prima facie* case. But in order to satisfy the remaining requirements it was necessary for Lowe to establish that an opening existed at the time she applied or afterwards, and that after she was rejected the City continued to accept applications from comparably qualified applicants. *See Gay,* 694 F.2d at 547; *Chavez v. Tempe Union High School District,* 565 F.2d 1087, 1091 (9th Cir.1977).

The City contends that Lowe failed to establish a *prima facie* case because no entry level job existed on the police force during the time the eligibility list which contained Lowe's name was active. According to the City, Lowe did not "apply," for purposes of the *McDonnell Douglas* test, until the eligibility list which contained her name became effective. The City also contends that the automatic expiration of the eligibility list on February 1, 1983 did not constitute a rejection. We cannot accept either of the City's arguments.

***1006** *McDonnell Douglas'* s second *prima facie* case requirement relates only to whether there was an opening either when the plaintiff applied or at any time her application was pending. The City advertised job openings on the police force prior to the time Lowe filed her application and Logans acknowledged that there was an opening after the time Lowe completed the application process-the opening that Razo was subsequently hired to fill. The City does not contend that there was "no opening" at any relevant time prior to the date of Razo's employment. It is not relevant for purposes of this requirement whether the City had a legitimate reason for delaying the effective date of the eligibility list on which Lowe's name was placed. Any such reason might undermine the inference of discrimination raised once a *prima facie* case has been established, but the order of proof set forth in *McDonnell Douglas* does not permit us to consider rebuttal evidence at the *prima facie* case stage. Rather, in a Title VII disparate treatment case such evidence is considered during the next analytic steps when we evaluate the City's articulated nondiscriminatory reason for not hiring the plaintiff. Thus, Lowe "applied" when she filed her application; she clearly met the second requirement.

Lowe also satisfied the fourth *McDonnell Douglas* requirement. After February 1, 1983, the City no longer considered Lowe an active, eligible applicant. Yet, the City does not contend that it ceased hiring entry-level police officers at that time, or that it suddenly changed the qualifications required of eligible candidates. Rather, it explains that eligibility lists automatically expire after six months. As with its practice of delaying the effective dates of its eligibility lists, the City may have a legitimate reason for maintaining the lists for only six months. However, any such justification, like any justification the City asserts for delaying the effective dates of the lists, may be considered only when we evaluate the articulated nondiscriminatory reason for not hiring the plaintiff. Whatever its reason, the City rejected Lowe on February 1, 1983 and continued to accept applications from similarly qualified candidates. Lowe has thus satisfied the final part of the *McDonnell Douglas* four-part test and established a *prima facie* case of discrimination.[5]

[14] In addition, a plaintiff can establish a *prima facie* case of disparate treatment without satisfying the *McDonnell Douglas* test. *See Diaz,* 752 F.2d at 1361; *Gay,* 694 F.2d at 550. Lowe has provided ***1007** evidence that suggests that "the employment decision was based on a discriminatory criterion illegal under the [Civil Rights] Act." *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 358, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977). Logans' statement to Lowe regarding the composition of the Monrovia police force and her suggestion that Lowe apply in Los Angeles instead of Monrovia, when viewed in conjunction with the fact that no Blacks were employed by the Monrovia Police

Department at the time Lowe applied, create an inference of discrimination sufficient to establish a *prima facie* case.6 Because Lowe has met the four-part *McDonnell Douglas* requirements and alternatively because she has provided direct and circumstantial evidence of discriminatory intent, she established a *prima facie* case of disparate treatment on the basis of race. Thus the district court erred when it based its award of summary judgment on the ground on which it relied.

2. *The City's Articulated Nondiscriminatory Reason for Rejecting Lowe and the Evidence of Pretext*

Because we are reviewing a district court's order granting summary judgment, we must examine the record to determine if there is any other basis for affirmance. *Diaz,* 752 F.2d at 1362. If the result below were correct, we would affirm even if the district court relied on an erroneous ground. *Keniston v. Roberts,* 717 F.2d 1295, 1300 & n. 3 (9th Cir.1983) (citing *Helvering v. Gowran,* 302 U.S. 238, 58 S.Ct. 154, 82 L.Ed. 224 (1937)). In order to determine whether any other basis for affirmance exists, we must examine the portions of the record that relate to the second and third steps governing the order of proof in disparate treatment cases.

After Lowe established a *prima facie* case of employment discrimination, the burden shifted to the City to rebut the presumption of discrimination by articulating a nondiscriminatory reason for not hiring her. To accomplish this, the City was only required to set forth a legally sufficient explanation for rejecting Lowe's application. *Burdine,* 450 U.S. at 254-55, 101 S.Ct. at 1094-95; *Teamsters,* 431 U.S. at 359, 97 S.Ct. at 1866-67. The City's articulated reason for not hiring Lowe was that it followed a long-standing nondiscriminatory practice with respect to the creation and maintenance of eligibility lists. The City contends that under the procedures it follows no entry-level job opening existed during the time the eligibility list which contained Lowe's name was in effect. There may very well be administrative constraints that would justify the City's use of a delayed effective-date, automatic-expiration system for eligibility lists. It may also be that it is preferable for the City to hire experienced officers in some instances. In any event, we assume, *arguendo,* that the City succeeded in articulating a legitimate nondiscriminatory reason for failing to hire Lowe.7

***1008 [15]** However, on a motion for summary judgment in a disparate treatment case, the defendant's articulation of a legitimate nondiscriminatory reason serves only to shift the burden back to the plaintiff to raise a genuine factual question as to whether the proffered reason is pretextual. *See Burdine,* 450 U.S. at 255-56, 101 S.Ct. at 1094-95. Lowe contends that the reason the City uses eligibility lists that have delayed effective dates and expire automatically is to mask its discriminatory hiring practices. She alleges that the City hires from eligibility lists if the candidates who rank high on the list are not Black but hires laterally when Blacks rank high on the lists. Lowe attempts to support this contention with a claim that Blacks are selected in a proportion smaller than their percentage in the pool of actual applicants. She alleges that six Blacks qualified on the eligibility lists between 1979 and 1982 but none were hired.8

A disparate treatment plaintiff may rely on statistical evidence to establish a *prima facie* case, *see Diaz,* 752 F.2d at 1362, or "to show that a defendant's articulated nondiscriminatory reason for the employment decision in question is pretextual," *id.* at 1363. As we explained in *Diaz,*

> Statistical data is relevant because it can be used to establish a general discriminatory pattern in an employer's hiring or promotion practices. Such a discriminatory pattern is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue.

Id. While statistical data may be extremely useful in demonstrating that a defendant's articulated reason for an employment decision is pretextual, in this case, however, as we noted earlier, Lowe's assertions of racial disparities in hiring are not supported by a proper statistical record. *See supra* p. 1005 & note 3.

[16] Nevertheless, we conclude that there is a genuine issue of material fact with respect to whether the reasons or motivations for the City's actions were in fact discriminatory. A plaintiff "may succeed in persuading the court that she has been the victim of intentional discrimination ... either by directly persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine,* 450 U.S. at 256, 101 S.Ct. at 1095. In order to do so, the plaintiff need not necessarily offer evidence beyond that offered to establish a *prima facie* case. *Id.* at 255 n. 10, 101 S.Ct. at 1095 n. 10. The trier of fact may consider the same evidence that the plaintiff has introduced to establish a *prima facie* case in determining whether the defendant's explanation for the employment decision is pretextual. *See id. Diaz,* 752 F.2d at 1363 n. 8.

In other civil rights contexts, we have made it clear that "the decision as to an employer's true motivation plainly is

one reserved to the trier of fact." *Peacock v. DuVal,* 694 F.2d 644, 646 (9th Cir.1982) (quoting *Nicholson v. Board of Education Torrance Unified School District,* 682 F.2d 858, 864 (9th Cir.1981)). This notion-that the question of an employer's intent to discriminate is "a pure question of fact," ***1009** *Pullman-Standard v. Swint,* 456 U.S. 273, 287-88, 102 S.Ct. 1781, 1789-90, 72 L.Ed.2d 66 (1982), to be left to the trier of fact-is well-established, *id.* at 288, 102 S.Ct. at 1789-90 (citing *Dayton Board of Education v. Brinkman,* 443 U.S. 526, 534, 99 S.Ct. 2971, 2977, 61 L.Ed.2d 720 (1979); *Commissioner v. Duberstein,* 363 U.S. 278, 286, 80 S.Ct. 1190, 1197, 4 L.Ed.2d 1218 (1960); *United States v. Yellow Cab Co.,* 338 U.S. 338, 341, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949)), and clearly applies in Title VII cases. *Id.* Moreover, an employer's true motive in an employment decision is rarely easy to discern. As we have previously noted, "[w]ithout a searching inquiry into these motives, those [acting for impermissible motives] could easily mask their behavior behind a complex web of *post hoc* rationalizations." *Peacock,* 694 F.2d at 646.

[17] As explained above, a plaintiff may establish a *prima facie* case of disparate treatment by satisfying the *McDonnell Douglas* four-part test, thereby creating a rebuttable presumption of discriminatory treatment, or by presenting actual evidence, direct or circumstantial, of the employer's discriminatory motive. When a plaintiff does not rely exclusively on the presumption but seeks to establish a *prima facie* case through the submission of actual evidence, very little such evidence is necessary to raise a genuine issue of fact regarding an employer's motive; any indication of discriminatory motive-including evidence as diverse as "the [defendant's] reaction, if any, to [plaintiff's] legitimate civil rights activities; and treatment of [plaintiff] during his prior term of employment; [defendant's] general policy and practice with respect to minority employment," *McDonnell Douglas,* 411 U.S. at 804-05, 93 S.Ct. at 1825-26-may suffice to raise a question that can only be resolved by a factfinder. Once a *prima facie* case is established either by the introduction of actual evidence or reliance on the *McDonnell Douglas* presumption, summary judgment for the defendant will ordinarily not be appropriate on any ground relating to the merits because the crux of a Title VII dispute is the "elusive factual question of intentional discrimination," *Burdine,* 450 U.S. at 255 n. 8.*See, e.g., Foster v. Arcata Associates, Inc.,* 772 F.2d 1453, 1459 (9th Cir. 1985) (courts generally cautious about granting summary judgment in Title VII cases where intent involved); *Sweat v. Miller Brewing Co.,* 708 F.2d 655, 657 (11th Cir. 1983) (" 'granting of summary judgment is especially questionable' " in employment discrimination cases (quoting *Hayden v. First National Bank,* 595 F.2d 994, 997 (5th Cir. 1979))); *McKenzie v. Sawyer,* 684 F.2d 62, 67 (D.C. Cir. 1982) (factual disputes in most Title VII cases preclude summary judgment). Moreover, when a plaintiff has established a *prima facie* inference of disparate treatment through direct or circumstantial evidence of discriminatory intent, he will necessarily have raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer's articulated reason for its employment decision.

According to the plaintiff's sworn affidavit, Logans, the Personnel Division Manager for the City, made a point of telling Lowe that the Monrovia police force had no women and no Blacks. Logans then encouraged Lowe to apply for a position as a police officer in Los Angeles rather than Monrovia. Logans explained that Lowe should do so because the Los Angeles police force was "literally begging for minorities and especially females." One clear inference that could reasonably be drawn from this statement is that the Monrovia police force was not begging for-or even interested in-such applicants.

Viewing all the evidence, including Logans' statements, in the light most favorable to Lowe and resolving all inferences in her favor, as we must, we conclude that there is a genuine issue of material fact regarding the City's motive in failing to hire Lowe.9 Accordingly, we cannot affirm ***1010** the district court's grant of summary judgment as to the Title VII race discrimination claim.

IV. SECTION 1981 AND SECTION 1983 CLAIMS

A. *Section 1981*

[18] Lowe alleges that the City's hiring procedures violated 42 U.S.C. § 1981 (1982). Her claim is based on both alleged sex and race discrimination. However, section 1981 redresses only discrimination based on race. *Shah v. Mount Zion Hospital and Medical Center,* 642 F.2d 268, 272 n. 4 (9th Cir.1981). Accordingly, the district court properly dismissed Lowe's section 1981 sex discrimination claim. *See White v. Washington Public Power Supply System,* 692 F.2d 1286, 1290 (9th Cir.1982).

[19] [20] [21] We cannot agree, however, with the district court's rejection of Lowe's section 1981 race discrimination claim. Title VII and section 1981 are overlapping but independent remedies for racial discrimination in employment. *Johnson v. Railway Express Agency,* 421 U.S. 454, 461, 95 S.Ct. 1716, 1720-21, 44 L.Ed.2d 295 (1975). Claims of disparate treatment arising under Title VII and section 1981 are parallel because both require proof of intentional discrimination. *Gay,* 694 F.2d at 537.10 The same

standards are used to prove both claims, *Gay,* 694 F.2d at 537, and facts sufficient to give rise to one are sufficient to give rise to the other.

[22] For the same reasons that we held the district court's grant of summary judgment on Lowe's Title VII claim to be improper, we must reverse its grant of summary judgment on Lowe's section 1981 claim. Lowe has presented sufficient evidence of discriminatory motive to entitle her to a trial on this claim as well.

B. ***Section 1983***

[23] Lowe also alleges that she is entitled to relief under 42 U.S.C. § 1983 (1982). Because section 1983 incorporates the equal protection standards that have developed in fourteenth amendment jurisprudence, *see Chavez v. Tempe Union High School District,* 565 F.2d 1087, 1095 (9th Cir.1977), in order to prevail on her section 1983 claim alleging race and sex discrimination Lowe must first prove that the defendants purposefully discriminated against her either because of her race or her sex. *See Massachusetts v. Feeney,* 442 U.S. 256, 272, 99 S.Ct. 2282, 2292, 60 L.Ed.2d 870 (1979); *Washington v. Davis,* 426 U.S. 229, 239-42, 96 S.Ct. 2040, 2047-49, 48 L.Ed.2d 597 (1976). The City could then successfully defend against the charge only if it could demonstrate that the discriminatory treatment was justified. Because a plaintiff does not have to exhaust ***1011** administrative remedies before bringing a section 1983 action, *Patsy v. Board of Regents,* 457 U.S. 496, 102 S.Ct. 2557, 2560, 73 L.Ed.2d 172 (1982), Lowe's failure to file an EEOC sex discrimination complaint does not bar her section 1983 sex discrimination claim.

The City denies that it has intentionally discriminated against Lowe. In the equal protection context, just as in a Title VII disparate treatment case, discriminatory intent need not be proved by direct evidence. "[D]etermining the existence of a discriminatory purpose demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Rogers v. Lodge,* 458 U.S. 613, 102 S.Ct. 3272, 3276, 73 L.Ed.2d 1012 (1982) (quoting *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977); citing *Washington v. Davis,* 426 U.S. at 242, 96 S.Ct. at 2049).

Lowe has established a triable issue regarding her claim that the City purposefully discriminated against her because of her race. *See supra* Section III.C. Because the evidence that satisfied the *McDonnell Douglas* test and the evidence of Logans' statements is at least as probative with regard to sex discrimination as it is with regard to race discrimination, Lowe has also established a triable issue regarding her claim that the City purposefully discriminated against her on the basis of sex. The City does not claim in this case that it has a constitutionally permissible justification for intentional discrimination on the basis of race or sex.

Accordingly, summary judgment on the section 1983 claims was inappropriate.

C. ***Qualified Immunity***

[24] [25] [26] The district court concluded as a matter of law that the individual defendants were shielded from liability under section 1981 and section 1983. Government officials are entitled to qualified immunity only if a reasonable person would not have been aware that the actions at issue violated well established statutory or constitutional rights. *Davis v. Scherer,* --- U.S. ----, 104 S.Ct. 3012, 3018, 82 L.Ed.2d 139 (1984); *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Whether the City employees are immune turns on the objective reasonableness of their conduct in light of clearly established law, not on their subjective good faith. *Tubbesing v. Arnold,* 742 F.2d 401, 405 (9th Cir.1984).

When the conduct that Lowe challenges took place it was well established that Lowe had a constitutional right not to be refused employment as a police officer because of her race or sex. *See supra* pp. 1010-1011. A reasonable person would have been aware that the practices that Lowe complains of were unlawful if, as she alleges, they were intended to deprive Blacks or women of employment opportunities. Therefore, the district court erred in concluding that the officials were immune from suit.

V. CONCLUSION

The district court correctly dismissed Lowe's Title VII and section 1981 sex discrimination claims; the Title VII claim was jurisdictionally barred and sex discrimination cannot be redressed under section 1981. However, the district court erred when it granted the City's summary judgment motion with respect to Lowe's Title VII, section 1981, and section 1983 race discrimination claims. Although Lowe did not offer sufficient facts to support her assertions of disparate impact, she did establish a *prima facie* case of disparate treatment on the basis of race and raised a genuine issue of material fact regarding the City's motivation in failing to hire her. The district court also erred with respect to Lowe's section 1983 sex discrimination claim. Lowe alleged sufficient facts to withstand the City's motion with respect to that claim. Finally, the district court erred in concluding that the

individual defendants enjoy a qualified immunity from the section 1981 and section 1983 claims.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

*1012 SCHWARZER, District Judge, dissenting in part.

The majority opinion holds that Lowe has made out a prima facie case of disparate treatment simply by showing that she was not hired by the City to fill a vacancy. It treats the City's rules and practices under which an applicant must qualify to be hired as mere evidence admissible at trial to rebut an inference of discrimination.

In so doing, the majority stands the case on its head,[1] ignores the settled law of this circuit, and creates a precedent that threatens the integrity of commonly used non-discriminatory civil service hiring systems.

In addressing the question whether Lowe made out a prima facie case, it is useful to recall the Supreme Court's observation that

> [t]he method suggested in *McDonnell Douglas* for pursuing this inquiry [whether a prima facie case has been established], however, was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.

Furnco Construction Corp. v. Waters, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978). This court elaborated on the reasoning in *Furnco* in *Gay v. Waiters' and Dairy Lunchmen's Union,* 694 F.2d 531 (9th Cir.1982), stating that the *McDonnell Douglas* test "presents the legal question whether the plaintiff has met his burden of production, coming forward with sufficient probative evidence to permit a rational jury or court to find the material facts in his favor, thus avoiding a directed verdict or motion for judgment as a matter of law." *Id.* at 543, n. 10.

The material facts are undisputed. Lowe filed her application with the City on January 19, 1982. She took and passed the written and oral examinations in May, 1982. The results of the examinations and the ranking of the applicants were announced in June, 1982, and an eligibility list of successful applicants was certified to take effect on August 1, 1982. Lowe ranked eleventh on that list, based on her grades on the examinations.

Meanwhile on June 7, 1982, the City hired a male hispanic applicant from its lateral transfer list to fill a vacancy. No additional persons were hired until after February 1, 1983, the date on which the list with Lowe's name expired.

It is not disputed that the procedure followed in this case conformed to the City's established rules and practices. Every six months the City certifies a new list of eligible applicants for entry level positions ranked in order of grades. The list remains in effect for six months when a new list is certified. In addition the City maintains a lateral entry level eligibility list from which it also fills vacancies for lateral entry.

These facts demonstrate that Lowe failed to establish a prima facie case for three reasons:

(1) At the time when Razo was hired in June, Lowe was not yet eligible to be hired because her name did not appear on a then effective eligibility list;

(2) During the period when she was eligible, there were no job openings;

*1013 (3) Even if Lowe were treated as having been eligible in June, her position as the eleventh on the eligibility list precludes any inference that the failure to hire her "more likely than not [was] based on the consideration of impermissible factors." *Furnco, supra.*[2] This case falls squarely within principles well-settled in this circuit. A plaintiff fails to establish the second element of *McDonnell Douglas* if she does not show that she completed the application process for the position, *Tagupa v. Board of Directors,* 633 F.2d 1309 (9th Cir.1980), and that she was a qualified applicant when the job opening existed. *Morita v. Southern Cal. Permanente Medical Group, supra; Chavez v. Tempe U. High Sch. Dist. No. 213,* 565 F.2d 1087 (9th Cir.1977); *Gay v. Waiter's and Dairy Lunchmen's Union, supra.* A plaintiff fails to establish the third element by failing to show that she was barred from consideration for the position or that she was not considered when others of her qualifications were. *White v. City of San Diego,* 605 F.2d 455 (9th Cir.1979).[3] The majority sweeps all of this aside by holding that "Lowe 'applied' when she filed her application" and that "the City rejected Lowe on February 1, 1983 [when the eligibility list expired]." (At 1006) To reach those conclusions, however, the majority has to disregard entirely the City's established rules and practices in

accordance with which it acted. Lowe challenged those rules and practices as having a disparate impact on Blacks. The court below granted summary judgment on that issue and the majority affirms. Thus we must accept those rules and practices as racially neutral.4

Under those rules and practices, the City hired only persons whose names appeared on a then certified eligibility list and a person did not become eligible for hire until she had qualified and been placed according to her rank on a certified list. There is no evidence to support the majority's characterization of the City's practice as "delaying the effective dates of its eligibility lists." (Majority at 1006) What the evidence shows is that the City regularly prepares a new list every six months and maintains it in effect for six months. Before a new list is prepared it advertises for applicants who may then take the examinations to qualify for placement on the new list. There is no evidence that the City in preparing and certifying the August 1, 1982, eligibility list acted other than in the ordinary course.

Nor is there any evidence that in permitting the August 1, 1982, list to expire on February 1, 1983, to be replaced by a new list, the City acted other than in accordance with its established rules and practices.

"[I]t is the plaintiff's task to demonstrate that similarly situated employees were not treated equally." *Texas Dept. of Community Affairs v. Burdine, supra* 450 U.S. at 258, 101 S.Ct. at 1096. Who are similarly situated employees? Presumably it would be others who had applied but whose eligibility list had not yet gone into effect when a job was filled, or whose eligibility list had expired when a job was filled. There is no evidence of any other person so situated, ***1014** let alone that any one in that position was treated differently. When the City made the decision to fill a position in June, it did not hire anyone who under its system was not eligible for consideration. During the period when Lowe was eligible, it did not hire anyone. When Lowe's list expired, it did not prevent her from reapplying for future consideration.

The majority's concern, of course, is that the City's system enables it to fill a vacancy with some one else if a minority applicant is coming up on the next eligibility list before that eligibility list goes into effect. It may be assumed that the City's system, as the majority says, "*permit[s]* the manipulation of hiring dates and job openings." (At 1010 n. 10, emphasis added). The trouble with that reasoning, however, is that a defendant cannot be held liable for a wrongful act without some evidence from which a trier of fact could find by a preponderance of the evidence not that he was capable of committing it but that he *did* commit it. Here there is not an iota of such evidence.5

Inasmuch as there is no evidence of disparate treatment, the City's Personnel Division Manager's alleged statement to Lowe that the City's police force had no women and no Blacks and her encouraging Lowe to apply to the Los Angeles Police Department instead is irrelevant. Evidence of motive is insufficient to establish a prima facie case in the absence of evidence of disparate treatment. *See Hagans v. Andrus,* 651 F.2d 622, 626 (9th Cir.), *cert. denied sub nom. Hagans v. Watt,* 454 U.S. 859, 102 S.Ct. 313, 70 L.Ed.2d 157 (1981); cf. *Thorne v. City of El Segundo,* 726 F.2d 459, 464 (9th Cir.1983).6 Here there is none.

It is appropriate to take note that the system of hiring off eligibility lists ranking applicants in order of their examination scores and having a limited life is common practice for public agencies. *See, e.g.* Cal.Gov't Code §§ 18900 *et seq.*, §§ 19050 *et seq.* Such a system promotes fair and open hiring based on qualifications; it offers early applicants a chance to qualify for job openings created after they have first applied while giving later applicants a chance to gain high ranking on a new list if their qualifications entitle them to it. So long as such a system is not shown to have a disparate impact, mere adherence to it does not afford a basis for finding disparate treatment. The majority's conclusion to the contrary raises the spectre of a rule under which minority employees must be considered for employment whenever openings exist, regardless of whether they are eligible under the public agency's hiring procedures. Title VII does not call for such preferential treatment. *Texas Dept. of Community Affairs v. Burdine, supra,* 450 U.S. at 259, 101 S.Ct. at 1096. *See also Atonio v. Wards Cove Packing Co., Inc.,* 768 F.2d 1120, 1132 (9th Cir.1985) ("essential that employers remain free to set employment qualifications as they honestly saw fit, so long as those qualifications were not based on race, color, religion, sex, or national origin."); and EEOC Uniform ***1015** Guidelines on Employee Selection Procedures, 29 CFR § 1607.1B (no restriction on "selection procedures where no adverse impact results") § 1607.11 (prohibition against disparate treatment does not preclude selection procedures in compliance with guidelines).

Because the undisputed facts would not permit a rational jury or judge to find that Lowe was subjected to disparate treatment or that, as the eleventh on the list, she would have been hired but for the City's discriminatory motive, I dissent from parts III.C. and IV and would affirm the judgment below.7

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Footnotes

* Hon. William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

1 We accept Lowe's version of her conversation with Logans because when we review an order granting summary judgment to the defendant we are required to view the facts in the light most favorable to the plaintiff. *Diaz v. American Tel. & Tel.,* 752 F.2d 1356, 1358 n. 1 (9th Cir.1985).

2 In the section of her brief devoted to her disparate treatment claim, Lowe argues that the City is obligated to adhere to its affirmative action plan. She does not raise the affirmative action contentions as a separate claim on appeal. *See infra* note 7.

3 Lowe's assertions of racial disparities in hiring are not supported by a proper statistical record. The only racial breakdown of applicants is for the year 1982.

4 The dissent is based on the proposition that a plaintiff who claims intentional employment discrimination, and alleges that an established procedure under which she was denied employment permits discriminatory treatment in particular cases, may not challenge the discriminatory application of the procedure to her unless she can show that it has been applied with similar discriminatory results to an entire class of job applicants. We disagree. The availability of a discriminatory treatment claim is not dependent on the plaintiff's ability to prove a discriminatory impact claim. To the contrary, as long as a plaintiff can establish an individual case of intentional discrimination, there is no need to show that the employer has also discriminated against an entire class.

5 We note that one of our recent cases, *Hagans v. Clark,* 752 F.2d 477 (9th Cir.1985), if read casually, could suggest that even a plaintiff who has satisfied the four-part *McDonnell Douglas* test may have failed to establish a *prima facie* case for purposes of some employment decisions. Of course, we did not intend in that case to establish a rule in direct contravention of the Supreme Court's statement of the law, as a more careful reading of the case makes clear. When we used the term "*prima facie* case" in *Hagans,* we were referring to the plaintiff's burden of putting on a case-in-chief that is sufficient to defeat a motion under Fed.R.Civ.P. 41(b) and thus to require the defendant to put on its case in opposition. We were not referring to the rebuttable presumption that a plaintiff must establish, as the first step in a Title VII case, before the defendant must articulate a legitimate, nondiscriminatory reason for the employment decision. *See Burdine,* 450 U.S. at 254 n. 7, 101 S.Ct. at 1094 n. 7 (defining "*prima facie* case" for purposes of *McDonnell Douglas* test). In *Hagans,* as in *Correa v. Nampa School District No. 131,* 645 F.2d 814 (9th Cir.1981), the plaintiff had already presented her case-in-chief at trial and the defendant had introduced evidence by way of cross-examination and depositions. *See Hagans,* 752 F.2d at 483. It was irrelevant at that stage of the proceedings whether the plaintiff had "met her initial [*prima facie* case] burden under *McDonnell Douglas,* [since the defendant] presented sufficient evidence in the form of affidavits, depositions and cross-examination of [the plaintiff's] witnesses to establish a reasonable, non-discriminatory reason for her discharge...." *Correa,* 645 F.2d at 816; *see also United States Postal Service v. Aikens,* 460 U.S. 711, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983) (When evidence is presented to a fact-finder at trial, "the *McDonnell-Burdine* presumption 'drops from the case,' ... and 'the factual inquiry proceeds to a new level of specificity.' "); *Kimbrough v. Secretary of U.S. Air Force,* 764 F.2d 1279, 1283 (9th Cir.1985) (same).

6 Lowe also contends that the City's failure to comply with its voluntarily adopted affirmative action plan raises an inference of intentional discrimination. Both public and private employers may voluntarily adopt race-conscious affirmative action plans to eliminate traditional patterns of segregation and imbalances in the work force, and Congress may require such plans. *See Fullilove v. Klutznick,* 448 U.S. 448, 482, 100 S.Ct. 2758, 2776-77, 65 L.Ed.2d 902 (1980) (opinion of Burger, C.J.); *United Steelworkers v. Weber,* 443 U.S. 193, 207-09, 99 S.Ct. 2721, 2729-30, 61 L.Ed.2d 480 (1979); *Johnson v. Transport. Agency,* 748 F.2d 1308, 1314 (9th Cir.1984). We need not determine at this time whether a defendant's failure to follow an affirmative action plan, once voluntarily adopted, could by itself demonstrate discriminatory intent. In any particular case the significance of such a failure may depend on the circumstances, including the reasons why the defendants failed to comply with the plan. Any evidence that indicates that a defendant intentionally circumvented an affirmative action plan would, of course, be probative regarding the defendant's motives in making a given employment decision.

7 The City also contends that even if it had filled the June 7, 1982 opening by hiring from the eligibility list that contained Lowe's name, Lowe would not have been offered the job. According to the City, Lowe was the eleventh candidate on the list. Lowe offered evidence purporting to show that she should have been second on the list. Lowe's proper place on the list does not matter. Whether Lowe was second or eleventh on the list, she would not have been the first person offered the position that was filled on June 7, 1982. Nevertheless, the fact that Lowe was not the first person on the list does not justify the City's failure to hire her. Regardless where Lowe ranked on the list, she eventually would have received a job offer if the City did not treat lists as automatically expiring after six months and did not occasionally hire laterally, practices that Lowe alleges the City engages in so that it can avoid hiring from its "Entry Level" list when Blacks and women qualify for inclusion.

8 Lowe also claims that the City "holds over" non-Blacks from old "Entry Level" eligibility lists and hires them later. This assertion is without support in the record; it is made by way of a memorandum of law rather than by proferred facts.

9 Our dissenting colleague concludes that no discriminatory act could have occurred in this case because the original opening was filled before the plaintiff became eligible for employment under the applicable civil service rules and no other openings were created until after her eligibility expired. The point is, however, that the rules at issue permit the manipulation of hiring dates and job openings. They are not as mechanical as the dissent suggests. When the City receives an application from a minority recruit applicant it can fill existing vacancies from a separate lateral list and thus foreclose the existence of an opening at the time the minority member completes the eligibility requirements and the new eligibility list becomes effective. Similarly, it can allow a list with high-ranking minority members to expire before announcing the existence of the next set of openings. Whether the City acted with discriminatory intent in any particular case is a matter for determination by a factfinder. It is not correct to say, as our dissenting colleague does, that the mere existence of a system of the nature of the City's precludes plaintiffs from showing intentional discriminatory treatment. The existence of such a system may provide a basis for the City's articulation of a nondiscriminatory reason for its actions, but it does not foreclose a plaintiff from challenging the City's motivation for adopting or invoking the system, or applying it in a particular manner. Here, as we have explained *supra,* the plaintiff has raised a genuine issue of fact as to whether the true motive for the City's actions was discriminatory.

10 A plaintiff suing under section 1981 may prevail only by establishing intentional discrimination, *i.e.,* disparate treatment. Proof of disparate impact is insufficient. *Gay v. Waiters' and Dairy Lunchmen's Union,* 694 F.2d 531, 537 (9th Cir.1982); *Craig v. County of Los Angeles,* 626 F.2d 659, 668 (9th Cir.1980).

1 The majority confuses the framework of rules and practices within which the City acted with non-discriminatory reasons for an employment decision which may rebut a prima facie case. (pp. 1007-1008) *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973) (after plaintiff has made a prima facie case, burden shifts to employer "to articulate some legitimate, non-discriminatory reason for the employee's rejection") It does so by in effect shifting a part of plaintiff's burden to make a prima facie case-her qualification to be hired-onto defendant by making it a part of its rebuttal case. *See Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981); *Morita v. Southern Cal. Permanente Medical Group,* 541 F.2d 217, 219 (9th Cir.1976). The error in this approach is discussed in what follows.

2 At oral argument, moreover, counsel for the City represented that the City is obligated to hire from among the top three candidates on any list.

> Inasmuch as the only issue concerns the filling of the vacancy in June 1982, it is not necessary to address the majority's point that if the lists did not automatically expire, the City would have had to hire Lowe eventually, no matter how low she ranked. (Majority at 1007 n. 7)

3 The City contends that Lowe failed to satisfy both the second and third elements. See App'ee Br. 10-16.

4 The majority rejects "Lowe's challenge to lateral hiring and the use of eligibility lists with delayed effective dates and automatic expiration times" because she "did not offer affidavits or documentary evidence sufficient to support her claim [of disparate impact]." (At 1005) It is difficult to follow the majority's logic under which these same practices, held to be neutral under the impact analysis, are held to raise an inference of disparate treatment. (At 1006)

5 Thus the majority misconceives the basis of this dissent. Obviously, it is not that "[t]he availability of a discriminatory treatment claim is ... dependent on the plaintiff's ability to prove a discriminatory impact claim." (At 1005 n. 5) Nor is it "that the mere existence of a system of the nature of the City's precludes plaintiffs from showing intentional discriminatory treatment." (At 1010 n. 10) Rather it is that a showing of nothing more than hiring in accordance with rules and practices found by the majority not to have been shown to have a discriminatory impact is insufficient to prove a prima facie case of discriminatory treatment.

6 The majority opinion correctly states that a plaintiff can establish a prima facie case of disparate treatment without satisfying the *McDonnell Douglas* test" (At 1007) but no case to this writer's knowledge has ever held that a plaintiff can do so without some proof of disparate treatment. *See* the cases cited by the majority (At 1007), *Diaz v. American Telephone & Telegraph,* 752 F.2d 1356, 1361 (9th Cir.1985) (plaintiff not precluded from suit merely because person of same protected class selected for challenged position); *Gay v. Waiters and Dairy Lunchmen's Union, supra,* 694 F.2d at 550 (reliable generalized statistical data relevant and admissible at prima facie stage of disparate treatment case to determine whether employment decision was product of intentional discrimination.)

7 In the light of the conclusion I reach, it is not necessary to address the majority's discussion of the individual defendants' qualified immunity. I do not understand, however, how "[a] reasonable person would have been aware that the practices Lowe complains of were unlawful" when this court itself has failed to find them so (At 1011); that awareness surely cannot be attributed ex post facto on the strength of allegations of discriminatory intent *subsequently* made in litigation.

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775 F.2d 998
United States Court of Appeals, Ninth Circuit.

The PEOPLE OF the STATE OF CALIFORNIA ex rel, John VAN DE KAMP, Attorney General of the State of California, Plaintiff-Appellee,
v.
The TAHOE REGIONAL PLANNING AGENCY, a separate legal entity created by Bi-State Compact, Defendant-Appellant,
Tahoe Shorezone Representation, a Nevada corporation, Intervenor-Appellant.

No. 84-2450. | Argued and Submitted May 15, 1985. | Decided July 22, 1985. | As Amended Oct. 31, 1985.

Attorneys and Law Firms

John K. Van de Kamp, Atty. Gen., N. Gregory Taylor, Asst. Atty. Gen., Richard M. Skinner, Deputy Atty. Gen., Sacramento, Cal., E. Clement Shute, Shute, Mihaly & Weinberger, San Francisco, Cal., for plaintiff-appellee.

William T. Chidlaw, Law Offices of William T. Chidlaw, Sacramento, Cal., for intervenor-appellant.

Prior Report: 766 F.2d 1319 (9th Cir.1985).

Before ANDERSON AND CANBY, Circuit Judges and NIELSEN,* District Judge.

Opinion

ORDER

The panel orders the following amendment to its opinion in this case, filed July 22, 1985:

Replace the language at page 9, lines 16-18, which states:

> The proposed TRPA Regional Plan will require the installation of best management practices on all shorezone property.

with the following:

> TRPA's goals include ultimately putting best management practices in place for all land in the Lake Tahoe region.

The petition for rehearing is denied.

Footnotes

* The Honorable Leland C. Nielsen, United States District Judge for the Southern District of California, sitting by designation.

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116 Idaho 708
Court of Appeals of Idaho.

Sydney Mae LOWRY, Individually, and Sydney Mae Lowry, as personal representative of the Estate of Steven Douglas Lowry, Deceased, Plaintiff–Counterdefendant–Appellant–Cross Respondent,
v.
IRELAND BANK, an Idaho banking corporation, and R. Brad Bowen, Defendants–Counterplaintiffs–Respondents–Cross Appellants.

No. 17624. | Sept. 1, 1989.

Widow brought action against bank seeking payment of credit life insurance proceeds and bank counterclaimed for payment on promissory note. The District Court, Sixth Judicial District, Bannock County, P. McDermott, J., granted summary judgment in favor of the bank in the action for insurance proceeds and entered judgment in favor of the bank on its counterclaim for payment on the promissory note. Widow and bank appealed. The Court of Appeals, Burnett, J., held that: (1) fact issues existed precluding summary judgment on widow's insurance claim; (2) widow could not raise lack of acknowledgement of her signature on deed of trust as defense to bank's counterclaim to collect on note; (3) bank was entitled to recover on promissory note without filing claim against husband's estate; and (4) where deed of trust that had been signed by widow and her husband authorized husband to obtain a further loan secured by the encumbered property, widow consented to additional loan made at her husband's request and such loan commensurately increased the encumbrance of the community property, despite the fact that widow signed no document increasing the loan, and, therefore, bank was entitled to collect the additional loan by foreclosure of the deed of trust.

Summary judgment vacated, judgment on counterclaim vacated in part, and case remanded.

West Headnotes (11)

[1] **Appeal and Error**
⇦Extent of Review Dependent on Nature of Decision Appealed from

In reviewing summary judgment, Court of Appeals determines whether there are any genuine issues of material fact and, if not, whether prevailing party below was entitled to summary judgment as a matter of law.

3 Cases that cite this headnote

[2] **Appeal and Error**
⇦Judgment

In reviewing summary judgment, Court of Appeals views the narrative facts in the light most favorable to the nonmoving party. Rules Civ.Proc., Rule 56(c).

[3] **Witnesses**
⇦Actions and Proceedings in Which Testimony Is Excluded

Dead man's statute did not apply to evidence used to defend against claim. Rules of Evid., Rule 601(b).

1 Cases that cite this headnote

[4] **Judgment**
⇦Weight and Sufficiency

Determination of credibility should not be made on summary judgment if credibility can be tested in court before trier of fact.

4 Cases that cite this headnote

[5] **Judgment**
⇦Banks, Cases Involving

In suit against bank alleging negligence in failing

to obtain credit life policy, fact issues existed precluding summary judgment as to whether bank manager's conduct was negligent and as to whether such negligence was superseded or outweighed by negligence on borrower's part.

1 Cases that cite this headnote

[6] **Husband and Wife**
Estoppel to Assert Invalidity

Wife could not raise lack of acknowledgement of her signature on deed of trust as defense to suit by bank to collect on note, where wife's conduct at the time the loan was made was consistent with the existence of a valid encumbrance, in that she and her husband accepted the loan proceeds and she admitted she signed the deed of trust. I.C. § 32–912.

1 Cases that cite this headnote

[7] **Alteration of Instruments**
Admissibility of Instrument in Evidence

Promissory note executed by husband and wife was admissible in evidence despite fact that it was altered to increase amount, where alteration was made with husband's participation and obvious consent.

1 Cases that cite this headnote

[8] **Executors and Administrators**
Claims Which Must Be Presented

Bank was entitled to recover on promissory note executed by husband and wife, without filing claim against husband's estate, where trust deed, which is a form of lien, was involved. I.C. §§ 9–601, 15–3–803.

[9] **Bills and Notes**
Parties Plaintiff

Bank which took over bank that made loan, assuming all of its assets, accounts, and liabilities, was real party in interest entitled to recover on promissory note. Rules Civ.Proc., Rule 17(a).

[10] **Husband and Wife**
Mortgage by Husband and Wife

General rule that community real property can be validly encumbered only if both spouses join in executing the instrument of encumbrance is subject to an exception if one spouse is authorized to act as an agent for the management and disposition of community real property. I.C. § 32–912.

1 Cases that cite this headnote

[11] **Husband and Wife**
Estoppel to Assert Invalidity

Where deed of trust signed by husband and wife authorized husband to obtain further loan secured by encumbered property, wife consented to additional loan made at her husband's request and the loan commensurately increased the encumbrance of community property, despite fact that wife signed no document increasing the loan; bank was entitled to collect the additional loan by foreclosure of the deed of trust. I.C. § 32–912.

Attorneys and Law Firms

****23 *709** A. Bruce Larson, Soda Springs, for appellant.

Guy R. Price, argued, and Archie W. Service, Green, Service, Gasser & Kerl, Pocatello, for respondent.

Opinion

BURNETT, Judge.

This appeal presents issues relating to a bank loan, credit life insurance and an encumbrance of community real property. Sydney Mae Lowry, a widow, brought this action against Ireland Bank, seeking payment of credit life insurance proceeds allegedly due upon her husband's death. The Bank counterclaimed, demanding payment **24 *710 on a promissory note she and her husband had signed. The district court entered summary judgment dismissing Mrs. Lowry's insurance claim, but the court held a bench trial on the bank's claim to recover on the note. Following that trial, the court entered a judgment for the bank, but for less than the amount sought. Both parties appealed. For reasons explained below we vacate the judgments and remand the case for further proceedings.

The background facts are as follows. Mrs. Lowry and her husband borrowed money to build an auto body repair shop on a parcel of land which they owned as community property. The loan was evidenced by a $20,000 revolving credit note in favor of Downey State Bank, a predecessor of Ireland Bank. The note was secured by a deed of trust on the shop property. The documents were prepared by the bank and signed by the Lowrys. The bank manager notarized the documents even though Mrs. Lowry's signature and acknowledgement did not occur in his presence. Later, Mr. Lowry amended the note by interlineation, increasing the loan to $25,600. The bank disbursed the additional $5,600 to the Lowrys' joint account. Mrs. Lowry did not initial the amendment of the note.

Approximately six months after the original note was signed, Mr. Lowry asked the bank to add credit life insurance to the note. The bank manager agreed, and he put a statement on the promissory note that Mr. Lowry had requested life insurance. The note was then submitted to the bank's insurance carrier. A few days later, the insurance carrier informed the bank that credit life insurance could not be added to an existing note.

What happened next is in dispute. The bank manager stated in a deposition that he called Mr. Lowry and told him about the insurance problem. The bank manager also stated that he offered to execute new loan documents if Mr. Lowry still wanted the insurance. If this conversation took place, it occurred at least three weeks after the insurance carrier had informed the bank it could not insure an existing note. Shortly after the alleged conversation, Mr. Lowry was killed in an airplane crash. The bank's files subsequently were found to contain new loan documents apparently awaiting signatures.

In her suit against the bank, Mrs. Lowry cast the insurance question as one of negligence. She alleged that the bank's manager negligently had failed to obtain the credit life insurance in a timely fashion. She demanded $25,600 in damages. As mentioned above, the bank counterclaimed on the amended note and sought foreclosure of the deed of trust. The district court dismissed Mrs. Lowry's claim and sustained the bank's claim, but limited the bank's recovery to the original $20,000 obligation.

On appeal, Mrs. Lowry has argued that dismissal of her claim by summary judgment was improper because there was a genuine issue of material fact concerning the bank manager's alleged negligence. She further contends that the note cannot be collected by foreclosure on the deed of trust, in any amount, because (a) the deed of trust is void for lack of proper acknowledgement of her signature; (b) the note has been materially altered and, therefore, should not have been admitted into evidence; (c) the bank did not timely file a claim in probate against her husband's estate; and (d) Ireland Bank, as successor to Downey State Bank, is not the real party in interest. In its cross appeal, Ireland Bank argues that it should be entitled to collect the full amount of the amended note, $25,600, from the encumbered real property.

I

|1| |2| We first address Mrs. Lowry's contention that summary judgment should not have been entered against her insurance claim. In our review of a summary judgment, we determine whether there are any genuine issues of material fact and, if not, whether the prevailing party below was entitled to summary judgment as a matter of law. I.R.C.P. 56(c). In reaching our decision, we view the narrative facts in the light most favorable to the non-moving party. Boise Car and Truck Rental Co. v. **25 *711 Waco, Inc., 108 Idaho 780, 702 P.2d 818 (1985).

|3| Here, the district court held there was no genuine issue of material fact as to the bank's negligence because the bank manager said he had telephoned Mr. Lowry and had told him that new loan documents were required for the credit life insurance.1 The district court concluded that this statement disproved any negligence by the bank because the conversation put Mr. Lowry on notice of the need to sign new documents. The court further concluded that Mr. Lowry was contributorily negligent in failing to sign the documents promptly.

[4] As noted, there is a dispute as to whether the bank manager actually did so notify Mr. Lowry. Mrs. Lowry suggests he did not. The only person who could confirm or directly controvert the bank manager's story is dead. The record contains a telephone bill showing the existence of a call from the bank to the Lowrys' telephone number. However, the bank concedes that the call occurred some three weeks after the insurance carrier informed the bank of its refusal to issue the credit life insurance. Moreover, the bank manager admitted falsely notarizing Mrs. Lowry's signature on the deed of trust. Taken together, these facts frame an issue of the bank manager's credibility. A determination of credibility should not be made on summary judgment if credibility can be tested in court before the trier of fact. *Argyle v. Slemaker,* 107 Idaho 668, 691 P.2d 1283 (Ct.App.1984).

[5] Moreover, even if Mr. Lowry was told during the telephone call of the need to sign new documents, this would not necessarily establish that the bank manager had acted in a timely fashion or that Mr. Lowry was contributorily negligent. If the bank manager did notify Mr. Lowry, he evidently waited several weeks before doing so. Mr. Lowry died a few days after the alleged notification. Viewing the facts in a light most favorable to Mrs. Lowry, a jury *could* find that the bank manager's conduct was negligent. In addition, the jury *could* find that such negligence was not superseded or comparatively outweighed by any negligence on Mr. Lowry's part. Accordingly, we conclude that summary judgment against Mrs. Lowry's insurance claim was improper.

II

We turn now to Mrs. Lowry's challenge to the judgment allowing the bank to collect the original $20,000 note by foreclosing against the shop property. She raises several issues, which we will address in turn.

A

Mrs. Lowry's first contention is that the deed of trust is void because her signature was not acknowledged as required by I.C. § 32–912. This statute provides that in order to convey or to encumber community realty, both spouses must sign and acknowledge the instrument of conveyance or encumbrance. However, the statute does not create an inexorable rule. In *Tew v. Manwaring,* 94 Idaho 50, 480 P.2d 896 (1971), our Supreme Court held that a party can waive the protective requirements of I.C. § 32–912. The Court stated that even if an instrument lacks an acknowledgment of a spouse's signature, the spouse will be deemed to have waived the defect if his or her conduct is consistent with the existence and validity of the instrument. *Id.* at 54, 480 P.2d at 900.

[6] Here, the Lowrys treated the deed of trust as valid, and they accepted the loan proceeds from the bank. Mrs. Lowry later admitted that she had signed the deed of trust. Consequently, we hold that her conduct was consistent with the existence of a valid encumbrance. She cannot now raise the lack of acknowledgment as a defense.

****26 *712 B**

We turn next to Mrs. Lowry's contention that the amended promissory note is an altered document that should not have been admitted into evidence. Idaho Code § 9–601 provides that an altered document may be admitted if the alteration is not "material to the question in dispute." It also provides that an altered document can be used as evidence if the alteration was made with the consent of the affected parties. The parties have not contended that the statute is inconsistent with the Idaho Rules of Evidence; accordingly, we will assume that it is effective and pertinent to the issue here. *See* I.R.E. 1102.

[7] It is undisputed that $20,000 was loaned to Mr. and Mrs. Lowry. Mrs. Lowry admits signing the note for that amount. Consequently, the document could be used to prove the $20,000 obligation. Moreover, Mrs. Lowry conceded in her complaint that her husband had borrowed the additional $5,600. She later verified that the initials on the note, appearing next to the amendment, were in Mr. Lowry's handwriting. As we will explain later, the bank has not contended that Mrs. Lowry is individually liable for the $5,600. Rather, it has contended that Mr. Lowry incurred the obligation and that it may be collected from the couple's community real property described in the deed of trust. Because the alteration of the note was made with Mr. Lowry's participation and obvious consent, we hold that the amended note was admissible as to the particular claim presented in this case.

C

[8] Mrs. Lowry further contends that the bank cannot recover on the note because it did not file a timely claim against her husband's estate under I.C. § 15–3–803. The bank filed no claim in probate against Mr. Lowry's estate; rather, it made a demand through its counterclaim in Mrs. Lowry's action, naming the estate as an additional counterdefendant. Nevertheless, Mrs. Lowry's reliance

upon I.C. § 15–3–803 is misguided. The statute itself contains an exception regarding proceedings to enforce a mortgage or other lien upon estate property. *See* I.C. § 15–3–803(c). Because this case involves a trust deed, which is a form of lien, the bank was not required to comply with the requirements elsewhere contained in the statute. Therefore, the statute is inapplicable to this case.

D

[9] Finally, Mrs. Lowry argues that Downey State Bank, not Ireland Bank, is the real party in interest. She invites attention to Rule 17(a), I.R.C.P., which requires every action to be "prosecuted in the name of the real party in interest." In this case, Downey State Bank made the loans. Mrs. Lowry filed her complaint against Downey State Bank. However, as noted by the district court, Ireland Bank subsequently took over Downey State Bank, assuming all of the bank's assets, accounts and liabilities. We deem it clear that Ireland Bank thereby became the real party in interest for this action, within the meaning of I.R.C.P. 17(a). *See Caughey v. George Jensen & Sons,* 74 Idaho 132, 258 P.2d 357 (1953) (real party in interest is one who has substantial interest in the subject matter and whose satisfaction of a judgment will bar further suit on the same matter). We see no error in treating Ireland Bank as the proper party in this case.

III

We now arrive at Ireland Bank's cross-appeal. The bank contends that the district court erred in its determination that the community real estate—i.e., the shop property described in the deed of trust—was encumbered only for the amount of the original note, $20,000. The bank argues that the additional $5,600 loan also was secured by the deed of trust. Mrs. Lowry counters that because she signed no document increasing the loan, the property is not a source of repayment beyond the original $20,000 obligation.

Of course, the bank does not assert that Mrs. Lowry is an individual obligor on the **27 *713 $5,600 loan.2 The mere fact that her husband borrowed the money would not impose personal liability upon her as a spouse. Idaho's community property laws do not displace fundamental principles governing individual liability for a debt. Rather, they simply affect the property to which creditors may look for satisfaction of the debt. *Twin Falls Bank & Trust Co. v. Holley,* 111 Idaho 349, 723 P.2d 893 (1986). Here, the bank argues that the shop property is a source of payment for the $5,600 debt because it was community property when the debt was incurred and has been encumbered by the deed of trust.

[10] We have noted that community real property can be validly encumbered only if both spouses join in executing the instrument of encumbrance. I.C. § 32–912. The statute evinces a legislative policy of protecting community real property from creditors, unless both spouses agree in writing to incur the debt. Thus, the statute usually requires two signatures. However, an exception to this general rule exists if one spouse is authorized to act as an agent for the management and disposition of community real property. *Noble v. Glenns Ferry Bank, Ltd.,* 91 Idaho 364, 367, 421 P.2d 444, 447 (1966). Our Supreme Court has held that such an agency may be created by an express power of attorney, as authorized by I.C. § 32–912, or may be inferred from the circumstances and conduct of the parties. *Noble,* 91 Idaho at 368, 421 P.2d at 448.

[11] In this case, the deed of trust recited that it was executed for the following purposes:

> [S]ecuring payment of the indebtedness evidenced by a promissory note, of even date herewith, executed by Grantor in the sum of Twenty Thousand and no/100ths dollars ($20,000.00), final payment due 8/10/89, and to secure payment of *all such further sums as may hereafter be loaned or advanced by the beneficiary herein to the Grantor herein, or any or either of them,* while record owner of present interest, for any purpose, and of any notes, drafts or other instruments representing such further loans, advances or expenditures together with interest on all such sums at the rate therein provided. (Emphasis added.)

Both spouses signed this instrument. It clearly authorized Mr. Lowry to obtain a further loan secured by the encumbered property. Nevertheless, the district court held that the property was not encumbered by the additional loan because Mrs. Lowry did not sign or initial the amendment to the promissory note. In so holding, the court focused too narrowly on whether Mrs. Lowry participated directly in obtaining the additional loan. The dispositive question is whether she consented to the additional loan, and to the commensurately increased encumbrance of the property, by agreeing that the bank could make such a loan at her husband's request. We hold that she did. Therefore, we must set aside the district court's determination that the bank was not entitled to collect the additional loan by foreclosure of the deed of trust.

In conclusion, we vacate the summary judgment dismissing Mrs. Lowry's insurance claim. We also vacate that part of the subsequent judgment limiting the bank's recovery to the original note obligation. We remand the case for proceedings in accordance with this opinion. Because the credit life insurance claim and the promissory note obligation are interrelated and potentially offsetting, and because this appeal has produced a mixed result, we decline to specify a prevailing party on appeal. Accordingly, we award no costs or attorney fees.

SWANSTROM, J., and HART, J. Pro Tem., concur.

Parallel Citations

779 P.2d 22

Footnotes

1 We note, incidentally, that Mrs. Lowry contends the "dead man's" statute, *see* I.R.E. 601(b), bars evidence concerning a telephone conversation between Mr. Lowry and the bank manager. We disagree. The statute does not apply to evidence used to defend against a claim. Because the evidence at issue here was used to defeat Mrs. Lowry's claim, I.R.E. 601(b) is inapposite.

2 Presumably because Mrs. Lowry has no individual liability for the $5,600 loan, the bank has conceded in oral argument that it can make no claim against any of her separate property. Neither does the bank appear to claim an encumbrance upon any real estate other than the shop property.

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93 S.Ct. 1817
Supreme Court of the United States

McDONNELL DOUGLAS CORPORATION, Petitioner, v. Percy GREEN.

No. 72-490. | Argued March 28, 1973. | Decided May 14, 1973.

Suit claiming violation of provisions of Civil Rights Act of 1964. The District Court, 299 F.Supp. 1100 and 318 F.Supp. 846, entered judgment, and appeal was taken. The Court of Appeals, 463 F.2d 337, ordered the case remanded, and certiorari was granted. The Supreme Court, Mr. Justice Powell, held that the Act did not restrict a complainant's right to sue to those charges as to which the Equal Employment Opportunity Commission has made findings of reasonable cause, and further held that where employer sought mechanics, complainant's trade and continued to do so after complainant's rejection and employer did not dispute complainant's qualifications, complainant proved prima facie case under Title VII and furthermore, employer, which assigned complainant's participation in unlawful conduct against it as cause for his rejection, discharged its burden of proof to articulate legitimate, nondiscriminatory reason for complainant's rejection, but on remand complainant had to be afforded a fair opportunity to show that employer's stated reason for complainant's rejection was in fact pretextual.

Cause remanded.

West Headnotes (9)

[1] **Civil Rights**
Civil Actions in General

Absence of an Equal Employment Opportunity Commission finding of reasonable cause cannot bar suit under an appropriate section of Title VII of the Civil Rights Act of 1964. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
77 Cases that cite this headnote

[2] **Civil Rights**
Civil Actions in General

Where complaint satisfied jurisdictional prerequisites to federal action under Title VII of the Civil Rights Act of 1964 by filing timely charges of employment discrimination with Equal Employment Opportunity Commission and by receiving and acting upon the Commission's statutory notice of right to sue, district judge erred in dismissing his claim of racial discrimination under provision dealing with whether for any reason a racially discriminatory employment decision has been made; the Act did not restrict a complainant's right to sue to those charges as to which the Commission has made findings of reasonable cause. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

1185 Cases that cite this headnote

[3] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving
Federal Courts
Particular Errors as Harmless or Prejudicial

Where it was not clear that district court's findings as to complainant's contentions under provision of Civil Rights Act of 1964 relating solely to discrimination against an applicant or employee on account of his participation in legitimate civil rights activities or protests involved identical issues raised by his claim under other provision of the Act dealing with whether for any reason a racially discriminatory employment decision has been made, dismissal of complainant's claim under the latter provision was not harmless error and he should have been accorded right to prepare his case and plan strategy of trial with knowledge that cause of action under that provision was properly before the district court. Civil Rights Act of 1964, §§ 703(a)(1), 704(a), 42 U.S.C.A. §§ 2000e-2(a)(1), 2000e-3(a).

2633 Cases that cite this headnote

[4] **Civil Rights**
⇐Discrimination by Reason of Race, Color, Ethnicity, or National Origin, in General

In implementation of employment and personnel decisions, Title VII of the Civil Rights Act of 1964 tolerates no racial discrimination, subtle or otherwise. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
417 Cases that cite this headnote

[5] **Civil Rights**
⇐Hiring
Civil Rights
⇐Presumptions, Inferences, and Burden of Proof

Complainant in a trial under Title VII of the Civil Rights Act of 1964 must carry initial burden under the statute of establishing a prima facie case of racial discrimination and that may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
27003 Cases that cite this headnote

[6] **Civil Rights**
⇐Hiring
Civil Rights
⇐Effect of Prima Facie Case; Shifting Burden
Civil Rights
⇐Weight and Sufficiency of Evidence
Civil Rights
⇐Prima Facie Case

Where employer sought mechanics, complainant's trade, and continued to do so after complainant's rejection and employer did not dispute complainant's qualifications, complainant proved prima facie case under Title VII of Civil Rights Act of 1964, and furthermore, employer, which assigned complainant's participation in unlawful conduct against it as cause for his rejection, discharged its burden of proof to articulate legitimate, nondiscriminatory reason for complainant's rejection, but on remand complainant had to be afforded a fair opportunity to show that employer's stated reason for complainant's rejection was in fact mere pretext. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
20406 Cases that cite this headnote

[7] **Civil Rights**
⇐Discharge or Layoff
Civil Rights
⇐Discharge or Layoff

Nothing in Title VII of the Civil Rights Act of 1964 compels an employer to absolve and rehire one who has engaged in deliberate, unlawful activity against it. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
284 Cases that cite this headnote

[8] **Civil Rights**
⇐Discharge or Layoff
Civil Rights
⇐Discharge or Layoff

Employer may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it but only if that criterion is applied alike to members of all races. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
251 Cases that cite this headnote

[9] **Civil Rights**
⇐Hiring
Civil Rights
⇐Particular Cases

Rejection of prospective employee for unlawful conduct against employer, in the absence of proof of pretextual or discriminatory application of such a reason, is not the kind of artificial, arbitrary and unnecessary barrier to employment

which it was the intent of Congress to remove under the Civil Rights Act of 1964. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
504 Cases that cite this headnote

**1819 *792 Syllabus*

Respondent, a black civil rights activist, engaged in disruptive and illegal activity against petitioner as part of his protest that his discharge as an employee of petitioner's and the firm's general hiring practices were racially motivated. When petitioner, who subsequently advertised for qualified personnel, rejected respondent's re-employment application on the ground of the illegal conduct, respondent filed a complaint with the Equal Employment Opportunity Commission (EEOC) charging violation of Title VII of the Civil Rights Act of 1964. The EEOC found that there was reasonable cause to believe that petitioner's rejection of respondent violated s 704(a) of the Act, which forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory employment conditions, but made no finding on respondent's allegation that petitioner had also violated s 703(a) (1), which prohibits discrimination in any employment decision. Following unsuccessful EEOC conciliation efforts, respondent brought suit in the District Court, which ruled that respondent's illegal activity was not protected by s 704(a) and dismissed the s 703(a)(1) claim because the EEOC had made no finding with respect thereto. The Court of Appeals affirmed the s 704(a) ruling, but reversed with respect to s 703(a)(1), holding that an EEOC determination of reasonable cause was not a jurisdictional prerequisite to claiming a violation of that provision in federal court. Held:

1. A complainant's right to bring suit under the Civil Rights Act of 1964 is not confined to charges as to which the EEOC has made a reasonable-cause finding, and the District Court's error in holding to the contrary was not harmless since the issues raised with respect to s 703(a)(1) were not identical to those with respect to s 704(a) and the dismissal of the former charge may have prejudiced respondent's efforts at trial. Pp. 1822-1823.

2. In a private, non-class-action complaint under Title VII charging racial employment discrimination, the complainant has the burden of establishing a prima facie case, which he can satisfy by showing that (i) he belongs to a racial **1820 minority; (ii) he *793 applied and was qualified for a job the employer was trying to fill; (iii) though qualified, he was rejected; and (iv) thereafter the employer continued to seek applicants with complainant's qualifications. P. 1824.

3. Here, the Court of Appeals, though correctly holding that respondent proved a prima facie case, erred in holding that petitioner had not discharged its burden of proof in rebuttal by showing that its stated reason for the rehiring refusal was based on respondent's illegal activity. But on remand respondent must be afforded a fair opportunity of proving that petitioner's stated reason was just a pretext for a racially discriminatory decision, such as by showing that whites engaging in similar illegal activity were retained or hired by petitioner. Other evidence that may be relevant, depending on the circumstances, could include facts that petitioner had discriminated against respondent when he was an employee or followed a discriminatory policy toward Minority employees. Pp. 1824-1826.

8 Cir., 463 F.2d 337, vacated and remanded.

Attorneys and Law Firms

Veryl L. Riddle, St. Louis, Mo., for petitioner.

Louis Gilden, St. Louis, Mo., for respondent.

Opinion

Mr. Justice POWELL delivered the opinion for a unanimous Court.

The case before us raises significant questions as to the proper order and nature of proof in actions under Title *794 VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. s 2000e et seq.

Petitioner, McDonnell Douglas Corp., is an aerospace and aircraft manufacturer headquartered in St. Louis, Missouri, where it employs over 30,000 people. Respondent, a black citizen of St. Louis, worked for petitioner as a mechanic and laboratory technician from 1956 until August 28, 1964[1] when he was laid off in the course of a general reduction in petitioner's work force.

Respondent, a long-time activist in the civil rights movement, protested vigorously that his discharge and the general hiring practices of petitioner were racially motivated.[2] As part of this protest, respondent and other members of the Congress on Racial Equality illegally stalled their cars on the main roads leading to petitioner's plant for the purpose of blocking access to it at the time of the morning shift change. The District Judge described the plan for, and respondent's participation in, the 'stall-in' as follows:

'(F)ive teams, each consisting of four cars would 'tie up' five main access roads into McDonnell at the time of the morning rush hour. The drivers of the cars were instructed to line up next to each other completely blocking the intersections or roads. The drivers were also instructed to stop their cars, turn off the engines, pull the emergency brake, raise all windows, lock the doors, and remain in their cars until the police arrived. The plan was to have the cars remain in position for one hour.

*795 'Acting under the 'stall in' plan, plaintiff (respondent in the present action) drove his car onto Brown Road, a McDonnell access road, at approximately 7:00 a.m., at the start of the morning rush hour. Plaintiff was aware of the traffic problems that would result. He stopped his car with the intent to block traffic. The police **1821 arrived shortly and requested plaintiff to move his car. He refused to move his car voluntarily. Plaintiff's car was towed away by the police, and he was arrested for obstructing traffic. Plaintiff pleaded guilty to the charge of obstructing traffic and was fined.' 318 F.Supp. 846.
On July 2, 1965, a 'lock-in' took place wherein a chain and padlock were placed on the front door of a building to prevent the occupants, certain of petitioner's employees, from leaving. Though respondent apparently knew beforehand of the 'lock-in,' the full extent of his involvement remains uncertain.3

*796 Some three weeks following the 'lock-in,' on July 25, 1965, petitioner publicly advertised for qualified mechanics, respondent's trade, and respondent promptly applied for re-employment. Petitioner turned down respondent, basing its rejection on respondent's participation in the 'stall-in' and 'lock-in.' Shortly thereafter, respondent filed a formal complaint with the Equal Employment Opportunity Commission, claiming that petitioner had refused to rehire him because of his race and persistent involvement in the civil rights movement, in violation of ss 703(a)(1) and 704(a) of the Civil Rights Act of 1964, 42 U.S.C. ss 2000e-2(a)(1) and 2000e-3(a).4 The former section generally prohibits racial discrimination in any employment decision while the latter forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory conditions of employment.

*797 The Commission made no finding on respondent's allegation of racial bias under s 703(a)(1), but it did find reasonable cause to believe petitioner had violated s 704(a) by refusing to rehire respondent because of his civil rights activity. After the Commission unsuccess-fully attempted to conciliate the dispute, it advised respondent in March 1968, of his right to institute a civil action in federal court within 30 days.

On April 15, 1968, respondent brought the present action, claiming initially a violation of s 704(a) and, in an amended **1822 complaint, a violation of s 703(a)(1) as well.5 The District Court, 299 F.Supp. 1100, dismissed the latter claim of racial discrimination in petitioner's hiring procedures on the ground that the Commission had failed to make a determination of reasonable cause to believe that a violation of that section had been committed. The District Court also found that petitioner's refusal to rehire respondent was based solely on his participation in the illegal demonstrations and not on his legitimate civil rights activities. The court concluded that nothing in Title VII or s 704 protected 'such activity as employed by the plaintiff in the 'stall in' and 'lock in' demonstrations.' 318 F.Supp., at 850.

On appeal, the Eighth Circuit affirmed that unlawful protests were not protected activities under s 704(a),6 but reversed the dismissal of respondent's s 703(a)(1) claim relating to racially discriminatory hiring practices, holding that a prior Commission determination of reasonable cause was not a jurisdictional prerequisite to raising a claim under that section in federal court. The court *798 ordered the case remanded for trial of respondent's claim under s 703(a)(1).

In remanding, the Court of Appeals attempted to set forth standards to govern the consideration of respondent's claim. The majority noted that respondent had established a prima facie case of racial discrimination; that petitioner's refusal to rehire respondent rested on 'subjective' criteria which carried little weight in rebutting charges of discrimination; that, though respondent's participation in the unlawful demonstrations might indicate a lack of a responsible attitude toward performing work for that employer, respondent should be given the opportunity to demonstrate that petitioner's reasons for refusing to rehire him were mere pretext.7 In order to clarify the standards governing the disposition of an action challenging employment discrimination, we granted certiorari, 409 U.S. 1036, 93 S.Ct. 522, 34 L.Ed.2d 485 (1972).

I

[1] [2] We agree with the Court of Appeals that absence of a Commission finding of reasonable cause cannot bar suit under an appropriate section of Title VII and that the District Judge erred in dismissing respondent's claim of racial discrimination under s 703(a)(1). Respondent satisfied the jurisdictional prerequisites to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory notice of the right to sue, 42

U.S.C. ss 2000e-5(a) and 2000e-5(e). The Act does not restrict a complainant's right to sue to those charges as to which the Commission has made findings of reasonable cause, and we will not engraft on the statute a requirement which may inhibit the review of ***799** claims of employment discrimination in the federal courts. The Commission itself does not consider the absence of a 'reasonable cause' determination as providing employer immunity from similar charges in a federal court, 29 CFR s 1601.30, and the courts of appeal have held that, in view of the large volume of complaints before the Commission and the nonadversary character of many of its proceedings, 'court actions under Title VII are de novo proceedings ****1823** and . . . a Commission 'no reasonable cause' finding does not bar a lawsuit in the case.' Robinson v. Lorillard Corp., 444 F.2d 791, 800 (CA4 1971); Beverly v. Lone Star Lead Construction Corp., 437 F.2d 1136 (CA,5 1971); Flowers v. Local 6, Laborers International Union of North America, 431 F.2d 205 (CA7 1970); Fekete v. United States Steel Corp., 424 F.2d 331 (CA 3 1970).

[3] Petitioner argues, as it did below, that respondent sustained no prejudice from the trial court's erroneous ruling because in fact the issue of racial discrimination in the refusal to re-employ 'was tried thoroughly' in a trial lasting four days with 'at least 80%' of the questions relating to the issue of 'race.'[8] Petitioner, therefore, requests that the judgment below be vacated and the cause remanded with instructions that the judgment of the District Court be affirmed.[9] We cannot agree that the dismissal of respondent's s 703(a)(1) claim was harmless error. It is not clear that the District Court's findings as to respondent's s 704(a) contentions involved the identical issues raised by his claim under s 703(a)(1). The former section relates solely to discrimination against an applicant or employee on account of his participation in legitimate civil rights activities or protests, while the latter section deals with the broader and centrally ***800** important question under the Act of whether for any reason, a racially discriminatory employment decision has been made. Moreover, respondent should have been accorded the right to prepare his case and plan the strategy of trial with the knowledge that the s 703(a)(1) cause of action was properly before the District Court.[10] Accordingly, we remand the case for trial of respondent's claim of racial discrimination consistent with the views set forth below.

II

The critical issue before us concerns the order and allocation of proof in a private, non-class action challenging employment discrimination. The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. Griggs v. Duke Power Co., 401 U.S. 424, 429, 91 S.Ct. 849, 852, 28 L.Ed.2d 158 (1971); Castro v. Beecher, 459 F.2d 725 (CA1 1972); Chance v. Board of Examiners, 458 F.2d 1167 (CA2 1972); Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (ED Va.1968). As noted in Griggs, supra:

'Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. ***801** What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.' Id., 401 U.S., at 430-431, 91 S.Ct., at 853.

[4] There are societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of ****1824** such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.

In this case respondent, the complainant below, charges that he was denied employment 'because of his involvement in civil rights activities' and 'because of his race and color.'[11] Petitioner denied discrimination of any kind, asserting that its failure to re-employ respondent was based upon and justified by his participation in the unlawful conduct against it. Thus, the issue at the trial on remand is framed by those opposing factual contentions. The two opinions of the Court of Appeals and the several opinions of the three judges of that court attempted, with a notable lack of harmony, to state the applicable rules as to burden of proof and how this shifts upon the making of a prima facie case.[12] We now address this problem.

***802 [5] [6]** The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[13] In the instant case, we agree with the

Court of Appeals that respondent proved a prima facie case. 463 F.2d 337, 353. Petitioner sought mechanics, respondent's trade, and continued to do so after respondent's rejection. Petitioner, moreover, does not dispute respondent's qualifications14 and acknowledges that his past work performance in petitioner's employ was 'satisfactory.'15

The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. We need not attempt in the instant case to detail every matter which fairly could be *803 recognized as a reasonable basis for a refusal to hire. Here petitioner has assigned respondent's participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination.

[7] The Court of Appeals intimated, however, that petitioner's stated reason for refusing to rehire respondent was a 'subjective' rather than objective criterion which 'carr[ies] little weight in rebutting charges of discrimination,' 463 F.2d, at 343. This was among the statements which caused the dissenting judge **1825 to read the opinion as taking 'the position that such unlawful acts as Green committed against McDonnell would not legally entitle McDonnell to refuse to hire him, even though no racial motivation was involved . . . .' Id., at 355. Regardless of whether this was the intended import of the opinion, we think the court below seriously underestimated the rebuttal weight to which petitioner's reasons were entitled. Respondent admittedly had taken part in a carefully planned 'stall-in,' designed to tie up access to and egress from petitioner's plant at a peak traffic hour.16 Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it.17 In upholding, under the National Labor Relations Act, the discharge of employees who had seized and forcibly retained *804 an employer's factory buildings in an illegal sit-down strike, the Court noted pertinently:

'We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,-to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property . . . Apart from the question of the constitutional validity of an enactment of that sort, it is enough to say that such a legislative intention should be found in some definite and unmistakable expression.' NLRB v. Fansteel Corp., 306 U.S. 240, 255, 59 S.Ct. 490, 496, 83 L.Ed. 627 (1939).

[8] Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by s 703(a)(1). On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.

Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and *805 practice with respect to minority employment.18 On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. **1826 Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (CA10 1970); Blumrosen, Strangers in Paradise: Griggs v. Duke Power Co., and the Concept of Employment Discrimination, 71 Mich.L.Rev. 59, 91-94 (1972).19 In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.

[9] The court below appeared to rely upon Griggs v. Duke Power Co., *supra,* in which the Court stated: 'If an employment practice which operates to exclude Negroes cannot *806 be shown to be related to job performance, the practice is prohibited.' 401 U.S., at 431, 91 S.Ct., at 853, 28 L.Ed.2d 158.20 But Griggs differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. Griggs was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. Id., at 430, 91 S.Ct., at 853. Respondent, however, appears in different clothing. He had engaged in a seriously disruptive act against the very one from whom he now seeks employment. And petitioner does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or

through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee. Petitioner assertedly rejected respondent for unlawful conduct against it and, in the absence of proof of pretext or discriminatory application of such a reason, this cannot be thought the kind of 'artificial, arbitrary, and unnecessary barriers to employment' which the Court found to be the intention of Congress to remove. Id., at 431, 91 S.Ct., at 853.21

***807 III**

In sum, respondent should have been allowed to pursue his claim under s 703(a) (1). If the evidence on retrial is substantially in accord with that before us in this case, we think that respondent carried his burden of establishing a prima facie case of racial discrimination and that petitioner successfully rebutted that case. But this does not end the matter. On retrial, respondent must be afforded a fair opportunity to demonstrate ****1827** that petitioner's assigned reason for refusing to re-employ was a pretext or discriminatory in its application. If the District Judge so finds, he must order a prompt and appropriate remedy. In the absence of such a finding, petitioner's refusal to rehire must stand.

The cause is hereby remanded to the District Court for reconsideration in accordance with this opinion.

So ordered.

Remanded.

Parallel Citations

93 S.Ct. 1817, 5 Fair Empl.Prac.Cas. (BNA) 965, 5 Empl. Prac. Dec. P 8607, 36 L.Ed.2d 668

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 His employment during these years was continuous except for 21 months of service in the military.

2 The Court of Appeals noted that respondent then 'filed formal complaints of discrimination with the President's Commission on Civil Rights, the Justice Department, the Department of the Navy, the Defense Department, and the Missouri Commission on Human Rights.' 463 F.2d 337 (8 Cir., 1972).

3 The 'lock-in' occurred during a picketing demonstration by ACTION, a civil rights organization, at the entrance to a downtown office building which housed a part of petitioner's offices and in which certain of petitioner's employees were working at the time. A chain and padlock were placed on the front door of the building to prevent ingress and egress. Although respondent acknowledges that he was chairman of ACTION at the time, that the demonstration was planned and staged by his group, that he participated in and indeed was in charge of the picket line in front of the building, that he was told in advance by a member of ACTION 'that he was planning to chain the front door,' and that he 'approved of' chaining the door, there is no evidence that respondent personally took part in the actual 'lock-in,' and he was not arrested. App. 132-133.
The Court of Appeals majority, however, found that the record did 'not support the trial court's conclusion that Green 'actively cooperated' in chaining the doors of the downtown St. Louis building during the 'lock-in' demonstration.' 463 F.2d, at 341. See also concurring opinion of Judge Lay. Id., at 344. Judge Johnsen, in dissent, agreed with the District Court that the 'chaining and padlocking (were) carried out as planned, (and that) Green had in fact given it . . . approval and authorization.' Id., at 348.
In view of respondent's admitted participation in the unlawful 'stall-in,' we find it unnecessary to resolve the contradictory contentions surrounding this 'lock-in.'

4 Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. s 2000e-2(a) (1), in pertinent part provides:
'It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ..'
Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. s 2000e-3(a), in pertinent part provides:
'It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . ..'

5 Respondent also contested the legality of his 1964 discharge by petitioner, but both courts held this claim barred by the statute of limitations. Respondent does not challenge those rulings here.

6 Respondent has not sought review of this issue.

7 All references are to Part V of the revised opinion of the Court of Appeals, 463 F.2d, at 352, which superseded Part V of the court's initial opinion with respect to the order and nature of proof. 463 F.2d 337.

8 Tr. of Oral Arg. 11.

9 Brief for Petitioner 40.

10 The trial court did not discuss respondent's s 703(a)(1) claim in its opinion and denied requests for discovery of statistical materials which may have been relevant to that claim.

11 The respondent initially charged petitioner in his complaint filed April 15, 1968, with discrimination because of his 'involvement in civil rights activities.' App. 7, 8. In his amended complaint, filed March 20, 1969, plaintiff broadened his charge to include denial of employment because of race in violation of s 703(a)(1). App. 27.

12 See original opinion of the majority of the panel which heard the case, 463 F.2d, at 338; the concurring opinion of Judge Lay, id., at 344; the first opinion of Judge Johnsen, dissenting in part, id., at 346; the revised opinion of the majority, id., at 352; and the supplemental dissent of Judge Johnsen, id., at 353. A petition for rehearing en banc was denied by an evenly divided Court of Appeals.

13 The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.

14 We note that the issue of what may properly be used to test qualifications for employment is not present in this case. Where employers have instituted employment tests and qualifications with an exclusionary effect on minority applicants, such requirements must be 'shown to bear a demonstrable relationship to successful performance of the jobs' for which they were used, Griggs v. Duke Power Co., 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). Castro v. Beecher, 459 F.2d 725 (CA1 1972); Chance v. Board of Examiners, 458 F.2d 1167 (CA2 1972).

15 Tr. of Oral Arg. 3; 463 F.2d, at 353.

16 The trial judge noted that no personal injury or property damage resulted from the 'stall-in' due 'solely to the fact that law enforcement officials had obtained notice in advance of plaintiff's (here respondent's) demonstration and were at the scene to remove plaintiff's car from the highway.' 318 F.Supp. 846, 851.

17 The unlawful activity in this case was directed specifically against petitioner. We need not consider or decide here whether, or under what circumstances, unlawful activity not directed against the particular employer may be a legitimate justification for refusing to hire.

18 We are aware that some of the above factors were, indeed, considered by the District Judge in finding under s 704(a), that 'defendant's (here petitioner's) reasons for refusing to rehire the plaintiff were motivated solely and simply by the plaintiff's participation in the 'stall in' and 'lock in' demonstrations.' 318 F.Supp., at 850. We do not intimate that this finding must be overturned after consideration on remand of respondent's s 703(a)(1) claim. We do, however, insist that respondent under s 703(a)(1) must be given a full and fair opportunity to demonstrate by competent evidence that whatever the stated reasons for his rejection, the decision was in reality racially premised.

19 The District Court may, for example, determine, after reasonable discovery that 'the (racial) composition of defendant's labor force is itself reflective of restrictive or exclusionary practices.' See Blumrosen, supra, at 92. We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire. See generally United States v. Bethlehem Steel Corp., 312 F.Supp. 977, 992 (WDNY 1970), order modified, 446 F.2d 652 (CA2 1971). Blumrosen, supra, n. 19, at 93.

20 See 463 F.2d, at 352.

21 It is, of course, a predictive evaluation, resistant to empirical proof, whether 'an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer.' 463 F.2d, at 353. But in this case, given the seriousness and harmful potential of respondent's participation in the 'stall-in' and the accompanying inconvenience to other employees, it cannot be said that petitioner's refusal to employ lacked a rational and neutral business justification. As the Court has noted elsewhere:
'Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust.' Garner v.

Board of Public Works of Los Angeles, 341 U.S. 716, 720, 71 S.Ct. 909, 912, 95 L.Ed. 1317 (1951).

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United States District Court, D. Oregon.

Michael MORROW, Plaintiffs, v. BARD ACCESS SYSTEMS, INC., a Utah corporation, Defendant.

Civil No. 3:10–cv–00209–JO. | June 20, 2011.

Synopsis

Background: Former employee brought action in state court against former employer, alleging age discrimination and wrongful discharge in violation of Oregon law. Following removal, employer filed motion for summary judgment.

Holdings: The District Court, Jones, J., held that:
[1] genuine issue of material fact existed as to whether employee was terminated because of his age, and
[2] there was no evidence that employee's complaints about safety of products were a factor in decision to terminate him.

Motion granted in part and denied in part.

West Headnotes (3)

[1] Federal Civil Procedure
⇦Employees and Employment Discrimination, Actions Involving

Genuine issue of material fact existed as to whether employee was terminated because of his age, precluding summary judgment in his age discrimination claim under Oregon law. West's Or.Rev. Stat. Ann. § 659A.030(1)(a).

[2] Civil Rights
⇦Disparate Treatment

The ultimate factual question that must be addressed in a civil action for age discrimination under Oregon law is whether the plaintiff has proved that the defendant intentionally discriminated against the plaintiff, that is, whether the defendant treated the plaintiff differently, and adversely, because of age. West's Or.Rev. Stat. Ann. § 659A.030(1)(a).

[3] Labor and Employment
⇦Causal Connection; Temporal Proximity

There was no evidence that employee's complaints about safety of products were a factor in decision to terminate him, as required for his wrongful discharge claim under Oregon law.

Attorneys and Law Firms

Richard C. Busse, Busse & Hunt, Portland, OR, for Plaintiffs.

Jeffrey S. Bosley, Man Overbeck, Winston & Strawn, LLP, San Francisco, CA, Ryan S. Gibson, Victor J. Kisch, Stoel Rives, LLP, Portland, OR, for Defendants.

Opinion

OPINION AND ORDER

JONES, District Judge:

***1** Plaintiff Michael Morrow brought this action against defendant Bard Access Systems, Inc., in state court, alleging claims for age discrimination under ORS Chapter 659A, and common law claims for wrongful discharge. Defendant removed the action to this court based on diversity jurisdiction.

The case is now before the court on defendant's motion (#

25) for summary judgment. For the reasons stated below, defendant's motion is denied as to plaintiffs age discrimination claim and granted as to the wrongful discharge claims.

STANDARDS

Summary judgment should be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). If the moving party shows that there are no genuine issues of material fact, the non-moving party must go beyond the pleadings and designate facts showing an issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact. *United Steelworkers of America v. Phelps Dodge,* 865 F.2d 1539, 1542 (9th Cir.1989).

The substantive law governing a claim determines whether a fact is material. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986): *see also T.W. Elec. Service v. Pacific Elec. Contractors,* 809 F.2d 626, 630 (9th Cir.1987). Reasonable doubts as to the existence of a material factual issue are resolved against the moving party. *T.W. Elec. Service,* 809 F.2d at 631. Inferences drawn from facts are viewed in the light most favorable to the non-moving party. *Id.* at 630–31.

DISCUSSION

The parties are familiar with their extensive evidentiary submissions, and I find it unnecessary to repeat the factual background of this dispute here. Having thoroughly reviewed the parties' arguments and submissions, I conclude that summary judgment on plaintiff's age discrimination claim must be denied, but that his wrongful discharge claims are not viable and must be dismissed.

1. *Age Discrimination*

[1] The record establishes that during his employment with defendant, plaintiff "was his own worst enemy," as defendant points out and has thoroughly documented. But the record also shows that plaintiff consistently was a top performer in sales. Despite plaintiff's success in sales, defendant contends that plaintiff's long history of administrative failings, misconduct, and other behavior, including the final unprofessional email[1] that is central to defendant's arguments, resulted in the decision to terminate his employment. The evidence strongly supports defendant's position.

Plaintiff, in turn, contends that age, not misconduct, was the reason for his termination. In support of his argument, plaintiff largely relies on his own affidavit, in which he describes statements made by several of defendant's managers that may be construed as demonstrating age bias. Because this is a summary judgment proceeding, the veracity of plaintiff's testimony is not before the court. Accepting plaintiff's testimony as true for purposes of the pending motion, a reasonable trier of fact could find that plaintiff's termination was an unlawful employment practice under ORS Chapter 659A.[2]

***2** The parties debate whether causation is measured by the "but for" test the United States Supreme Court articulated in *Gross v. FBL Fin. Servs. Inc.,* 557 U.S. 167, 129 S.Ct. 2343, 2351, 174 L.Ed.2d 119 (2009), for federal Age Discrimination in Employment Act ("ADEA") cases, or the "substantial factor" test ordinarily applied in Oregon state law discrimination claims. *See, e.g., Seitz v. State by and Through Albina Resources Center,* 100 Or.App. 665, 675, 788 P.2d 1004 (1990)(sex and race discrimination). Neither party has cited an Oregon appellate court decision that addresses the specific issue of causation in a ORS Chapter 659A age discrimination case, nor has this court found one.

[2] It is tempting to construe the language of the Oregon law as the Supreme Court did in *Gross,* because the pertinent language interpreted in *Gross* is identical in both statutes, *i.e.,* with respect to causation, both statutes prohibit discrimination "because of age." *Compare* 29 U.S.C. § 623(a)(1) with ORS 659A.030(1)(a). The ADEA, however, specifically applies only to age discrimination, while ORS 659A.030(1)(a) prohibits discrimination "because of race, color, religion, sex, sexual orientation, national origin, marital status or age...." As noted above, although no Oregon appellate decision interprets the "because of language in the context of an age discrimination case, the courts have clarified that the 'substantial factor' " test applies to other forms of discrimination prohibited by the same statute. *See, e.g., Ettner v. City of Medford,* 178 Or.App. 303, 35 P.3d 1140 (2001) (gender); *Winnett v. City of Portland,* 118 Or.App. 437, 847 P.2d 902 (1993) (sex); *Seitz, supra,* 100 Or.App. at 675, 788 P.2d 1004 (sex and race); *see also Ventura v. Johnson Controls, Inc.,* 2010 WL 3767882 at *10 (D.Or. Sept. 16, 2010). And as the Oregon Court of Appeals recently noted:

> The ultimate factual question that must be addressed in such a civil action is whether the plaintiff has proved that the defendant intentionally discriminated against the plaintiff, that is, whether the

> defendant treated the plaintiff differently, and adversely, because of ... age.

Christianson v. State of Oregon, 239 Or.App. 451, 455, 244 P.3d 904 (2010).

The record in this case strongly supports an inference that plaintiff was, indeed, terminated for performance deficiencies and misconduct. On the other hand, the record also demonstrates that defendant initially planned to respond to plaintiff's unprofessional email by disciplining him and giving him a formal letter of reprimand, not terminating him. The fact that defendant terminated plaintiff just weeks before his second installment of deferred stock awards was to vest, coupled with plaintiff's testimony concerning age-based comments by defendant's managers, permits an inference, albeit a weak one, that plaintiff's age was a substantial factor in defendant's decision to terminate him. Based on the above, I conclude that plaintiff's evidence is sufficient to establish his *prima facie* case of discrimination under the evidentiary framework established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), which this court applies to both federal and Oregon state law discrimination claims. *Snead v. Metropolitan Property & Casualty Insurance Company,* 237 F.3d 1080, 1094 (9th Cir.2001).

2. *Wrongful Discharge*

*3 Plaintiff alleges two claims for wrongful discharge, one tort claim and one contract claim. In the tort claim, plaintiff alleges that he was wrongfully discharged for complaining about allegedly unsafe products that defendant marketed. In his so-called "wrongful termination-contract" claim, plaintiff alleges that defendant terminated him to avoid having to pay certain stock awards that had not yet vested. *See* Amended Complaint, Claims 2 and 3.

Oregon courts have repeatedly affirmed the validity of the "at-will employment rule," holding that " '[g]enerally an employer may discharge an employe[e] at any time and for any reason, absent a contractual, statutory or constitutional requirement [to the contrary].' " *Babick v. Oregon Arena Corporation,* 333 Or. 401, 407 and n. 2, 40 P.3d 1059 (2002) (*quoting Patton v. J.C. Penney Co.,* 301 Or. 117, 120, 719 P.2d 854 (1986)). Oregon courts also recognize, however, that discharge of an at-will employee may be deemed "wrongful" under certain circumstances, for example, "when the discharge is for exercising a job-related right that reflects an important public policy" or "when the discharge is for fulfilling some important public duty." *Babick,* 333 Or. at 407, 40 P.3d 1059 (citations omitted).

[3] Plaintiff's "wrongful discharge" tort claim fits neither example. More importantly, plaintiff has presented no plausible evidence that his complaints about products were a factor, let alone a substantial factor, in defendant's decision to discharge him. Similarly, even if the court were to accept plaintiff's "wrongful termination—contract" theory of recovery,3 there is no plausible evidence that the future vesting of stock awards, standing alone, resulted in defendant's decision to terminate plaintiff or even was a substantial factor in that decision. The possible vesting of future stock awards is relevant only as some circumstantial evidence, albeit weak evidence, of age discrimination, as plaintiff suggests and the court, with reservation, accepts. *See* discussion *supra.*

CONCLUSION

For the reasons stated, defendant's motion (# 25)is granted in part and denied in part, as follows: GRANTED as to plaintiff's wrongful discharge claims (Claims 2 and 3) and DENIED as to plaintiff's age discrimination claim (Claim 1).

Footnotes

1 In response to an inquiry from a clinical nurse at OHSU, one of defendant's significant customers, concerning whether plaintiff wanted to continue as the industry representative on the Oregon Vascular Access Network ("ORVAN"), plaintiff responded:

> You are kidding, right? I have heard the terrible and untrue things you, Jamie, and Leslie have said about me. I have heard it from [defendant], and I have heard it from several different reps as well. I hope I never have to be in the same room as any of you. You have disparaged me and killed my career at [defendant]. You should all be ashamed of yourselves. I will pray for you all, but I will not put myself in a position to be your scapegoat ever again. The lack of integrity and truthfulness you have all demonstrated is deplorable, and I cannot pretend for political reasons that it is not. So, no, I do now want anything to do with [ORVAN].

See, e.g., Declaration of Richard Busse, Attachment 21. Plaintiff sent the email on January 11, 2009; he was terminated on January 26, 2009, a mere two weeks later.

2 Defendant filed evidentiary objections to plaintiff's declaration (# 40), but I decline to rule on those objections at this juncture.

3 I agree with defendant that plaintiff's "wrongful discharge—contract" claim fails as a matter of law for the reasons set forth in Defendant's Reply, pp. 29–30. Further, whether ERISA is or is not implicated by plaintiff's contract claim is not an issue this court must address to resolve defendant's motion; the court also rejects plaintiff's argument that he has a valid ERISA claim because his Amended Complaint alleges no such claim.

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116 S.Ct. 1307
Supreme Court of the United States

James O'CONNOR, Petitioner,
v.
CONSOLIDATED COIN CATERERS CORPORATION.

No. 95-354. | Argued Feb. 27, 1996. | Decided April 1, 1996.

Employee who was discharged after reorganization brought Age Discrimination in Employment Act (ADEA) action against former employer. The United States District Court for the Western District of North Carolina, Robert D. Potter, Senior District Judge, 829 F.Supp. 155, granted summary judgment in favor of former employer. Former employee appealed. The Court of Appeals, Hamilton, Circuit Judge, 56 F.3d 542, affirmed. Certiorari was granted. The Supreme Court, Justice Scalia held that fact that ADEA plaintiff was replaced by someone outside protected class is not a proper element of *McDonnell Douglas* prima facie case.

Reversed and remanded.

West Headnotes (3)

[1] **Civil Rights**
Practices Prohibited or Required in General; Elements
Civil Rights
Age Discrimination

Assuming that Title VII's *McDonnell Douglas* burden-shifting framework applies to ADEA cases, there must be at least a logical connection between each element of prima facie case and illegal discrimination. Age Discrimination in Employment Act of 1967, §§ 2 et seq., 4(a)(1), as amended, 29 U.S.C.A. §§ 621 et seq., 623(a)(1).

939 Cases that cite this headnote

[2] **Civil Rights**
Discharge or Layoff

Fact that ADEA plaintiff was replaced by someone outside protected class is not a proper element of *McDonnell Douglas* prima facie case; given that discrimination prohibited by ADEA is discrimination because of individual's age, fact that one person in protected class has lost out to another person in protected class is irrelevant, so long as he has lost out because of his age. Age Discrimination in Employment Act of 1967, § 4(a)(1), as amended, 29 U.S.C.A. § 623(a)(1).

1439 Cases that cite this headnote

[3] **Civil Rights**
Age Discrimination

The ADEA prohibits discrimination on the basis of age and not class membership. Age Discrimination in Employment Act of 1967, § 2 et seq., as amended, 29 U.S.C.A. § 621 et seq.
197 Cases that cite this headnote

****1308 *308 *Syllabus**

At age 56, petitioner was fired by respondent corporation and replaced by a 40-year-old worker. He then filed this suit, alleging that his discharge violated the Age Discrimination in Employment Act of 1967 (ADEA). The District Court granted respondent's summary judgment motion, and the Court of Appeals affirmed, holding that petitioner failed to make out a prima facie case of age discrimination under *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668, because he failed to show that he was replaced by someone outside the age group protected by the ADEA.

Held: Assuming that Title VII's *McDonnell Douglas* framework is applicable to ADEA cases, there must be at least a logical connection between each element of the prima facie case and the illegal discrimination. Replacement by someone under 40 fails this requirement. Although the ADEA limits its protection to those who are 40 or older, it prohibits discrimination against those protected employees on the basis of age, not class membership. That one member of the protected class lost out to another member is irrelevant, so long as he lost out *because of his age.* The latter is more reliably indicated by

the fact that his replacement was substantially younger than by the fact that his replacement was not a member of the protected class.

56 F.3d 542 (CA4 1995), reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court.

Attorneys and Law Firms

George Daly, Charlotte, NC, for petitioner.

Paul R.Q. Wolfson, Washington, DC, for U.S., as amicus curiae by special leave of the Court.

***309** James B. Spears, Jr., Greenville, SC, for respondent.

Opinion

Justice SCALIA delivered the opinion of the Court.

This case presents the question whether a plaintiff alleging that he was discharged in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.*, must show that he was replaced by someone outside the age group protected by the ADEA to make out a prima facie case under the framework established by *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

Petitioner James O'Connor was employed by respondent Consolidated Coin Caterers Corporation from 1978 until August 10, 1990, when, at age 56, he was fired. Claiming that he had been dismissed because of his age in violation of the ADEA, petitioner brought suit in the United States District Court for the Western District of North Carolina. After discovery, the District Court granted respondent's motion for summary judgment, 829 F.Supp. 155 (1993), and petitioner ***310** appealed. The Court of Appeals for the Fourth Circuit stated that petitioner could establish a prima facie case under *McDonnell Douglas* only if he could prove that (1) he was in the age group protected by the ADEA; (2) he was discharged or demoted; (3) at the time of his discharge or demotion, he was performing his job at a level that met his employer's legitimate expectations; and (4) following his discharge or demotion, he was replaced by someone of comparable qualifications outside the protected class. Since petitioner's replacement was 40 years old, the Court of Appeals concluded that the last element of the prima facie case had not been made out.[1] 56 F.3d 542, 546 (1995). Finding that petitioner's claim could not survive a motion for summary judgment without benefit of the *McDonnell Douglas* presumption (*i.e.*, "under the ordinary standards of proof used in civil cases," 56 F.3d, at 548), the Court of Appeals affirmed the judgment of dismissal. We granted O'Connor's petition for certiorari. 516 U.S. 973, 116 S.Ct. 472, 133 L.Ed.2d 401 (1995).

In *McDonnell Douglas,* we "established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases." *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 506, 113 S.Ct. 2742, 2746, 125 L.Ed.2d 407 (1993). We held that a plaintiff alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, could establish a prima facie case by showing "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of [the] complainant's qualifications." ***311** *McDonnell Douglas,* 411 U.S., at 802, 93 S.Ct., at 1824. Once the plaintiff has met this initial burden, the burden of production shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Ibid.* If the trier of fact finds that the elements of the prima facie case are supported by a preponderance of the evidence and the employer remains silent, the court must enter judgment for the plaintiff. *St. Mary's Honor Center, supra,* at 509-510, and n. 3, 113 S.Ct., at 2748-2749, and n. 3; *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981).

[1] In assessing claims of age discrimination brought under the ADEA, the Fourth Circuit, like others,[2] has applied some variant ****1310** of the basic evidentiary framework set forth in *McDonnell Douglas.* We have never had occasion to decide whether that application of the Title VII rule to the ADEA context is correct, but since the parties do not contest that point, we shall assume it. Cf. *St. Mary's Honor Center, supra,* at 506, n. 1, 113 S.Ct., at 2747, n. 1 (assuming that "the *McDonnell Douglas* framework is fully applicable to racial-discrimination-in-employment claims under 42 U.S.C. § 1983"). On that assumption, the question presented for our determination is what elements must be shown in an ADEA case to establish the prima facie case that triggers the employer's burden of production.

[2] As the very name "prima facie case" suggests, there must be at least a logical connection between each element

of the prima facie case and the illegal discrimination for which it ***312** establishes a "legally mandatory, rebuttable presumption," *Burdine, supra,* at 254, n. 7, 101 S.Ct., at 1094, n. 7. The element of replacement by someone under 40 fails this requirement. The discrimination prohibited by the ADEA is discrimination "because of [an] individual's age," 29 U.S.C. § 623(a)(1), though the prohibition is "limited to individuals who are at least 40 years of age," § 631(a). This language does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age.* Or to put the point more concretely, there can be no greater inference of *age* discrimination (as opposed to "40 or over" discrimination) when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old. Because it lacks probative value, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case.

[3] Perhaps some courts have been induced to adopt the principle urged by respondent in order to avoid creating a prima facie case on the basis of very thin evidence-for example, the replacement of a 68-year-old by a 65-year-old. While the respondent's principle theoretically permits such thin evidence (consider the example above of a 40-year-old replaced by a 39-year-old), as a practical matter it will rarely do so, since the vast majority of age-discrimination claims come from older employees. In our view, however, the proper solution to the problem lies not in making an utterly irrelevant factor an element of the prima facie case, but rather in recognizing that the prima facie case requires "*evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion . ...*" *Teamsters v. United States,* 431 U.S. 324, 358, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977) (emphasis ***313** added). In the age-discrimination context, such an inference cannot be drawn from the replacement of one worker with another worker insignificantly younger. Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.

The judgment of the Fourth Circuit is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

Parallel Citations

116 S.Ct. 1307, 70 Fair Empl.Prac.Cas. (BNA) 486, 67 Empl. Prac. Dec. P 43,927, 134 L.Ed.2d 433, 64 USLW 4243, 96 Cal. Daily Op. Serv. 2222, 96 Daily Journal D.A.R. 3716

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The court also concluded that even under a modified version of the *McDonnell Douglas* prima facie standard which the Fourth Circuit applies to reduction-in-force cases, see *Mitchell v. Data General Corp.,* 12 F.3d 1310, 1315 (1993), petitioner could not prevail. We limit our review to the Fourth Circuit's treatment of this case as a non-reduction-in-force case.

2 See, *e.g., Roper v. Peabody Coal Co.,* 47 F.3d 925, 926-927 (C.A.7 1995); *Rinehart v. Independence,* 35 F.3d 1263, 1265 (C.A.8 1994), cert. denied, 514 U.S. 1096, 115 S.Ct. 1822, 131 L.Ed.2d 744 (1995); *Seman v. Coplay Cement Co.,* 26 F.3d 428, 432, n. 7 (C.A.3 1994); *Roush v. KFC Nat. Mgt. Co.,* 10 F.3d 392, 396 (C.A.6 1993), cert. denied, 513 U.S. 808, 115 S.Ct. 56, 130 L.Ed.2d 15 (1994); *Lindsey v. Prive Corp.,* 987 F.2d 324, 326, n. 5 (C.A.5 1993); *Goldstein v. Manhattan Industries, Inc.,* 758 F.2d 1435, 1442 (C.A.11), cert. denied, 474 U.S. 1005, 106 S.Ct. 525, 88 L.Ed.2d 457 (1985); *Haskell v. Kaman Corp.,* 743 F.2d 113, 119, and n. 1 (C.A.2 1984); *Cuddy v. Carmen,* 694 F.2d 853, 856-857 (C.A.D.C.1982); *Douglas v. Anderson,* 656 F.2d 528, 531-532 (C.A.9 1981); *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1014-1016 (C.A.1 1979); *Schwager v. Sun Oil Co. of Pa.,* 591 F.2d 58, 60-61 (C.A.10 1979).

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134 Idaho 778
Supreme Court of Idaho,
Rexburg, May 2000 Term.

Sondra OLSON, Plaintiff–Appellant,
v.
EG&G IDAHO, INC., and Constance C. Blackwood, Defendants–Respondents.

No. 23611. | Sept. 7, 2000.

Employee whose employment was terminated based upon her alleged poor performance and no indication of her willingness to improve brought action against employer and her supervisor, alleging wrongful discharge, defamation, self-defamation, and emotional distress. The District Court, Bonneville County, Brent, J. Moss, J., granted summary judgment to employer on many of employee's claims, and following jury trial on remaining claims, granted judgment notwithstanding the verdict (JNOV) on claims in which the jury found for employee. Employee appealed. The Supreme Court, Kidwell, J., held that: (1) supervisor's statements in employee's notice of termination were not made with malice; (2) employer was not liable to employee on employee's defamation claim; and (3) substantial competent evidence supported jury's determination that employee failed to prove severe emotional distress.

Affirmed.

West Headnotes (10)

[1] **Libel and Slander**
⇦Falsity

Supervisor of employee's statements in employee's notice of termination that employee had failed to comply with requirements of the Corrective Action Plan (CAP), and that employee was not willing to improve, were truthful, and thus were not made with malice, so as to support employee's defamation claim against supervisor, where employee testified that she had not attended word processing training or database training, as required by CAP, and she admitted that she had not achieved mastery of the database system.

[2] **Appeal and Error**
⇦Extent of Review Dependent on Nature of Decision Appealed from
Appeal and Error
⇦Appeal from Ruling on Motion to Direct Verdict

In reviewing a decision to grant or deny a motion for judgment notwithstanding the verdict (JNOV), or a directed verdict, the Supreme Court applies the same standard as that applied by the trial court when originally ruling on the motion. Rules Civ.Proc., Rule 50(b).

1 Cases that cite this headnote

[3] **Judgment**
⇦Where Directed Verdict or Binding Instructions Would Have Been Proper

When a trial court reviews a motion for judgment notwithstanding the verdict (JNOV), the motion is treated as a delayed motion for a directed verdict and the same standard is applied for both. Rules Civ.Proc., Rule 50(b).

[4] **Judgment**
⇦Where There Is Some Substantial Evidence to Support Verdict

When ruling on a motion for judgment notwithstanding the verdict (JNOV), the trial court must determine whether there is substantial evidence to support the jury's verdict. Rules Civ.Proc., Rule 50(b).

[5] **Judgment**
Evidence and Inferences That May Be Considered or Drawn
Judgment
Where There Is Some Substantial Evidence to Support Verdict

Upon a motion for judgment notwithstanding the verdict (JNOV), the moving party admits the truth of all the adverse evidence and all inferences that can be drawn legitimately from it; it is not a question of no evidence on the side of the non-moving party, but rather, whether there is substantial evidence upon which a jury could find for the non-moving party. Rules Civ.Proc., Rule 50(b).

[6] **Appeal and Error**
Extent of Review Dependent on Nature of Decision Appealed from

Supreme Court will not make a finding of substantial evidence in favor of the non-moving party when reviewing a decision to grant or deny a motion for judgment notwithstanding the verdict (JNOV) if it concludes that there can be but one conclusion as to the verdict that reasonable minds could have reached. Rules Civ.Proc., Rule 50(b).

1 Cases that cite this headnote

[7] **Judgment**
Evidence and Inferences That May Be Considered or Drawn
Judgment
Credibility of Witnesses and Weight of Evidence

In deciding a motion for judgment notwithstanding the verdict (JNOV), the trial court may not reweigh the evidence or consider the credibility of the witnesses; instead, it must draw all inferences in favor of the non-moving party. Rules Civ.Proc., Rule 50(b).

2 Cases that cite this headnote

[8] **Appeal and Error**
Review of Evidence

In determining whether a jury properly found that there is clear and convincing evidence of actual malice in a defamation suit, the Supreme Court must determine whether there is sufficient evidence to support the conclusion that the defendant entertained serious doubts as to the truth of her statements or that subjectively defendant had a high degree of awareness of the probable falsity of the statements; the Supreme Court's focus will be on whether the evidence indicates that defendant purposely avoided the truth.

[9] **Libel and Slander**
Malice

Employer was not liable to employee on employee's defamation claim against employer, based on supervisor's comments in employee's notice of termination, which indicated that employee had failed to comply with requirements of the Corrective Action Plan (CAP) and was not willing to improve, absent evidence that supervisor acted with malice in making such statements.

1 Cases that cite this headnote

[10] **Damages**
Mental Suffering and Emotional Distress

Substantial competent evidence supported jury's determination that employee failed to prove severe emotional distress, based on employer's termination of her employment, though employee's psychiatrist testified that employee's loss of her employment was a very serious stressor; testimony of psychiatrist was rebutted by testimony of witness who was employed in employer's human resources office that six

months after employee's termination, witness saw employee and employee seemed cheerful and pleased to see her, and witness agreed that she did not notice any change in employee's demeanor or behavior between their meeting or when employee left her employment.

2 Cases that cite this headnote

Attorneys and Law Firms

**1245 *779 Stephen A. Meikle, Idaho Falls, for appellant.

Pike & Shurtliff, Idaho Falls, for respondents. Edward W. Pike argued.

Opinion

KIDWELL, Justice.

In this employment discrimination case, the appellant was terminated for "poor performance" and "no indication of willing[ness] to improve." The appellant claimed that the allegations were false and that the employer was discriminating against her. Prior to trial, the district court granted summary judgment to the employer on many of the appellant's claims. Following a jury trial on the remaining claims, the district court granted judgment notwithstanding the verdict (j.n.o.v.) on the claims in which the jury found for the appellant. The decision of the district court is affirmed.

I.

FACTS AND PROCEDURAL BACKGROUND

In June of 1975, Sondra Olson began working for Aero Jet Company at the Idaho National Engineering Laboratory (INEL) (now INEEL). In 1976, when Aero Jet was replaced by EG&G Idaho, Olsen was employed as a project control representative. Thirteen years later, Olson was promoted to EG&G's Academic Programs Office (APO). In this **1246 *780 position, Olson was responsible for the fellowship research program of the Associated Western Universities (AWU). The AWU, a consortium of 50 universities, was under contract with the U.S. Department of Energy. The AWU was responsible for recruiting university students, usually at the under-graduate level, for summer jobs. When applications were received, Olson would pair the students with appropriate mentor engineers who requested assistance for research projects. Olson also coordinated student security clearances and assisted students with finding accommodations during the summer. Between 1989 and 1993, the APO grew significantly, as did Olson's responsibilities for the AWU program. During this time of growth, Olson was rated good to excellent on the performance of her responsibilities.

In March of 1993, the Department of Energy gave EG & G Idaho a negative performance evaluation during a semi-annual review. Also in March of 1993, respondent Constance C. Blackwood was appointed manager of the APO as well as Olson's supervisor. Soon after becoming Olson's supervisor, Blackwood began to require Olson to perform specific tasks in limited amounts of time. On March 22, 1993, Blackwood directed Olson to input 700–800 AWU applications and to develop an acknowledgement letter all in the same day. Olson testified that Blackwood gave her similar directives that were not possible to accomplish in the time allotted.

Blackwood testified that after being appointed manager of the APO, she began receiving phone calls about Olson's performance. Blackwood noted that Olson had not submitted several weekly reports to the Department of Energy. She further stated that although she had met with Olson on several occasions to remedy Olson's poor performance, Olson had not been responsive to her suggestions.

On May 7, 1993, Blackwood met with the Women's Program Manager, Arantza Zabala, to discuss Olson's performance. Sherree Schell of EG&G Idaho's Human Resource Office was also at the meeting. During the meeting, it was determined that a corrective action plan would be implemented to educate Olson on her deficiencies and to determine whether Olson was capable of adequately performing the job. Blackwood showed the plan to Olson on July 9, 1993. Thereafter Olson and Blackwood met every Friday to discuss Olson's performance under the plan. Blackwood testified that during these meetings Olson was unresponsive to Blackwood's suggestions. Olson described the meetings as extremely unpleasant and uncomfortable.

On August 12, 1993, Blackwood terminated Olson as an EG&G Idaho employee because Olson had failed to comply with the corrective action plan in a satisfactory manner. After being informed of the termination, Olson returned to her work station where she was met by armed

security guards. The security guards escorted Olson to her car with her belongings, consisting of a refrigerator and several boxes of personal items.

Olson testified that following her termination she suffered from anxiety attacks and depression. Olson stated that she constantly worried about what her fellow employees at EG&G Idaho were thinking about her being escorted by armed security guards. Olson's psychiatrist testified that Olson required medication to control depression and that without medication Olson had a 90% chance of relapsing into depression.

On December 28, 1993, Olson filed a complaint against EG&G Idaho, Blackwood, and John Does I–X, alleging wrongful discharge, defamation, self-defamation and emotional distress. Olson made her first motion to amend her complaint on June 21, 1994, seeking to add claims for violation of privacy and violation of civil rights. Following the EEOC's notice of right to sue, Olson filed a second amended complaint on December 15, 1994, adding age and disability discrimination claims as well as a claim under the False Claims Act (31 U.S.C. § 3729).

On January 20, 1995, EG&G Idaho and Blackwood (respondents) moved to dismiss portions of Olson's second amended complaint. On August 10, 1995, the district court dismissed John Does I–X and Olson's False Claims Act claim. Olson filed her third amended complaint on August 30, 1995. On **1247 *781 February 13, 1996, she moved to amend her complaint a fourth time, this time adding another False Claims Act claim as well as breach of contract and equal protection claims. Also on February 13, 1996, respondents filed for summary judgment on all claims.

In an order dated April 9, 1996, the district court granted respondents summary judgment on Olson's claims for wrongful termination, self-defamation, negligent infliction of emotional distress, violation of privacy, violation of due process/civil rights (42 U.S.C. § 1983), and age and disability discrimination under the Idaho Human Rights Act. The court denied the motion as to defamation and intentional infliction of emotional distress. The court also denied the motion to dismiss Blackwood as a party defendant. On April 18, 1996, Olson moved for reconsideration, however the district court denied her motion.

Olson moved to amend her complaint for a sixth time on August 8, 1996. The district court denied Olson's sixth amended complaint but allowed her to file a seventh amended complaint to provide more specific and definite allegations than those contained in the sixth. On August 28, 1996, Olson filed a motion to amend her seventh amended complaint to add a claim under the False Claims Act and to add EG&G, Inc., the parent corporation of EG&G Idaho, as a party.

On September 19, 1996, respondents moved to dismiss EG&G, Inc. as a party and to dismiss Olson's False Claims Act claim. The district court granted respondents' motions, denied Olson leave to amend her seventh amended complaint to add EG & G, Inc. and dismissed Olson's False Claims Act claim.

A jury trial began on December 3, 1996. At the close of Olson's case, respondents moved for a directed verdict on all claims. The district court granted the motion as to the claim of intentional infliction of emotional distress against Blackwood, but denied the motion as to the remainder of Olson's claims. On December 18, 1996, the jury began deliberations. During deliberations the jury sent out a note concerning jury instruction number 15, intentional infliction of emotional distress. Over Olson's objection, the district court modified the instruction to include examples from cases where courts had found intentional infliction of extreme emotional distress.

The jury entered special verdicts on December 19, 1996. The jury found that Olson had established a case of defamation against Blackwood, but not against EG&G Idaho. The jury also found that Olson had not proven her case of intentional infliction of emotional distress against EG&G Idaho. Following the jury's special verdicts, the parties made opposing motions for j.n.o.v. The district court granted Blackwood's motion and denied Olson's. On February 3, 1996, Olson filed a timely notice of appeal.

II.

ANALYSIS

A. The District Court Did Not Err In Granting Blackwood's Motion For J.N.O.V. On Olson's Defamation Claim.

[1] The district court granted Blackwood's motion because it found there was not enough evidence that Blackwood acted with malice. On appeal, Olson claims that the district court erred because it ruled contrary to its ruling on Blackwood's motion for a directed verdict following the close of Olson's case. Alternatively, Olson argues that the jury was presented with substantial evidence of Blackwood's malice.

[2] [3] [4] In reviewing a decision to grant or deny a motion for j.n.o.v., or a directed verdict, this Court applies the

same standard as that applied by the trial court when originally ruling on the motion. *Quick v. Crane,* 111 Idaho 759, 764, 727 P.2d 1187, 1192 (1986). When a court reviews a motion for j.n.o.v. under I.R.C.P. 50(b), the motion is treated as a delayed motion for a directed verdict and the same standard is applied for both. *Quick,* 111 Idaho at 763, 727 P.2d at 1191. When ruling on a motion for j.n.o.v., the trial court must determine whether there is substantial evidence to support the jury's verdict. *Lanham v. Idaho Power Co.,* 130 Idaho 486, 495, 943 P.2d 912, 921 (1997).

*782 [5] [6] [7] **1248 "Upon a motion for JNOV, the moving party ... admits the truth of all the adverse evidence and all inferences that can be drawn legitimately from it." *Id.* at 496, 943 P.2d at 922. It is not a question of no evidence on the side of the non-moving party, but rather, whether there is substantial evidence upon which a jury could find for the non-moving party. *Quick,* 111 Idaho at 763, 727 P.2d at 1191. This Court will not make a finding of substantial evidence in favor of the non-moving party if it concludes "that there can be but one conclusion as to the verdict that reasonable minds could have reached." *Id.* at 764, 727 P.2d at 1192. In deciding a motion for j.n.o.v. the trial court may not reweigh the evidence or consider the credibility of the witnesses. Instead, it must draw all inferences in favor of the non-moving party. *Lanham,* 130 Idaho at 496, 943 P.2d at 922.

At the close of Olson's case, respondents moved for a directed verdict. Concerning Blackwood's motion, the district court ruled that:

> On the defamation matter, the issue I believe there is malice. I believe there was communication, it was privileged and, of course, the question now is was it made maliciously. And all I would indicate (sic) there is I think if the jury took all the inferences in favor of Plaintiff's case, they could, perhaps, find malice. And I will allow them to do so.

Following the jury's verdict that Olson had proved a cause of action for defamation against Blackwood, Blackwood made a motion for j.n.o.v. In ruling upon that motion, the court held that:

> Now, defamation has to be proven by clear and convincing evidence. Now, as to defamation, the jury has determined that. However, the Court cannot agree with it on the basis of the law, that there was sufficient evidence presented to show actual malice in this termination. In doing that, I'm not deciding who was right in this matter, but I'm just simply deciding what the law requires me to decide. I cannot decide that the evidence, perhaps a preponderance of the evidence would support that claim, but I cannot find clear and convincing, based on everything I've heard, everything I've reviewed, to show actual malice.

On Blackwood's motion for j.n.o.v., the district court was required to determine whether there was substantial and competent evidence to support the jury's conclusion that there was clear and convincing evidence that Blackwood acted with malice. The district court ruled that while there might have been a preponderance of evidence upon which the jury could have found that Blackwood acted with malice, there was not clear and convincing evidence. Thus, we must review the record to determine whether, taking all inferences in favor of Olson, there was substantial and competent evidence to support the jury's conclusion that Olson proved by clear and convincing evidence that Blackwood acted with malice.

[8] In determining whether a jury properly found that there is clear and convincing evidence of actual malice in a defamation suit, this Court "must determine whether there is sufficient evidence to support the conclusion that [Blackwood] in fact entertained serious doubts as to the truth of [her] statements or that subjectively [Blackwood] had a high degree of awareness of the probable falsity of the statements. Our focus will be on whether the evidence indicates that [Blackwood] purposely avoided the truth." *Wiemer v. Rankin,* 117 Idaho 566, 576, 790 P.2d 347, 357 (1990).

The difficulty presented by this issue is that Olson has not cited any singular, particular comment made by Blackwood, but rather, ambiguously cites "statements by Blackwood to the EEO office and the Human Resources Office as documented in the record." The record contains three documents which Olson has argued make up the defamatory comments: (1) the notice of termination, (2) the EEO memorandum, and (3) the Corrective Action Plan (CAP). Olson argues that the "most damaging defamatory statements made by Blackwood against Olson were in the notice of termination which alleged poor performance and failure to meet any of the requirements of the CAP as well as unsatisfactory or inadequate skills and unwillingness to improve."

**1249 *783 Olson responds to these allegations by arguing that "she documented substantial completion or scheduled for completion all of the items required in the CAP." The CAP noted seven items that Olson was to

complete in order to improve her performance. At trial, Olson testified that she had completed, attempted to complete, or had scheduled for completion each of the seven items listed in the CAP. For example, she testified that she was scheduled to begin WordPerfect training the day after she was terminated. Olson testified that she prepared a program plan and presented it to Blackwood but that Blackwood did not consider it sufficient. Additionally, Olson testified that for each of the requirements of the CAP she communicated her progress to Blackwood.

From this testimony, Olson concludes the Blackwood acted with malice because Blackwood knew that Olson was attempting to complete the requirements of the CAP. However, the evidence does not support her conclusion. While Olson testified that she was in the process of completing the CAP requirements, she also testified that she had not completed all of the requirements prior to her termination. She testified that she had not attended WordPerfect training or database training. She also admitted that she had not achieved mastery of the database system.

Therefore, while there is some evidence that Blackwood may have acted with malice, there is also evidence that Blackwood was truthful when she indicated that Olson had failed to comply with the requirements of the CAP and was not willing to improve.

Additionally, we disagree with Olson's claim that the district court was inconsistent when it granted Blackwood's motion for j.n.o.v. after having denied her motion for directed verdict on the defamation claim. At the time of Blackwood's motion for directed verdict, the district court had not heard the evidence presented by both sides. After considering the entire evidence of both sides, the district court was in a better position to determine the merits of each litigant's case. Therefore, we affirm the district court's decision granting Blackwood's motion for j.n.o.v. on Olson's defamation claim.

B. The District Court Properly Denied Olson's Motion For J.N.O.V. On Her Defamation Claim Against EG&G Idaho.

[9] Olson claims that the district court erred in refusing to grant her motion for j.n.o.v. in the face of inconsistent jury verdicts. She claims that EG&G is liable because Blackwood was acting within the scope of her employment when she defamed Olson.

We have determined that the district court did not err in granting Blackwood's motion for j.n.o.v. on Olson's defamation claim. Therefore, the district court did not err in refusing to grant Olson's motion for j.n.o.v. Absent a ruling that Blackwood acted with malice, and thus defamed Olson, there is no basis upon which EG&G could be liable for defamation against Olson.

C. The District Court Properly Denied Olson's Motion For J.N.O.V. On Her Claim Of Intentional Infliction Of Emotional Distress.

[10] Olson argues that she provided the jury with substantial and competent evidence that her emotional distress was severe. She contends that the district court should have granted her motion for j.n.o.v. because respondents did not rebut that evidence.

As stated above, this Court reviews the record to determine whether there is substantial and competent evidence upon which the jury could find that Olson's emotional distress was not severe. *Lanham v. Idaho Power Co.,* 130 Idaho at 495, 943 P.2d at 921.

At trial, Olson's psychiatrist testified that Olson was suffering from post traumatic stress disorder and that the stress had been aggravated by the armed guards. The psychiatrist testified that Olson's depression "markedly decreased her enjoyment of life," and that Olson suffered from "psychiatry agoraphobia, which is a fear of going outside." Additionally, the psychiatrist stated that "At the time of my evaluation, Mrs. Olson would not have been able to work because of the severe anxiety, the uncontrolled panic attacks, her fears, her performance **1250 *784 anxiety and just the tremendous panic that she had about leaving the house." The psychiatrist concluded that Olson's loss of her employment was, on the severity scale, close to losing a spouse, and was a "very serious stressor, it's in the top four or five."

This testimony, as Olson contends, could have provided the jury with sufficient evidence to determine that Olson's emotional distress was extreme. However, Olson is incorrect in her claim that the evidence was unrefuted.

As pointed out by respondents, this testimony was rebutted by testimony from Olson and from Sherree Schell. Olson testified that she began working for Mary Kay Cosmetics while she was still employed by EG & G and that she continued to sell them after her termination. Schell testified that she talked with Olson at a craft fair about six months after Olson's termination. During their conversation Olson seemed cheerful and generally pleased to see Schell. Finally, Schell agreed that she did not notice any change in Olson's demeanor or behavior between their meeting at the craft fair or when Olson had left EG & G.

Thus, the jury was provided with evidence which it could have relied upon to determine that Olson's emotional distress was not as severe as indicated by Olson's psychiatrist. The district court properly determined that there was substantial and competent evidence to support the jury's determination that Olson had failed to prove that her emotional distress was severe.

D. The Remainder Of Olson's Issues On Appeal Are Without Merit.

After having carefully considered the rest of Olson's issues on appeal, we find them to be without merit. The decision of the district court is affirmed on all issues relevant to this appeal.

III.

CONCLUSION

The district court did not err in granting Blackwood's motion for j.n.o.v. on the issue of defamation. Likewise, the district court correctly granted EG&G's motion for j.n.o.v. on the issue of EG&G's liability for Olson's defamatory comments. The decision of the district court is affirmed. No attorney fees are awarded on appeal. Costs to respondents.

Chief Justice TROUT, Justices SILAK, SCHROEDER and WALTERS concur.

Parallel Citations

9 P.3d 1244

End of Document

151 Idaho 310
Supreme Court of Idaho,
Boise, June 2011 Term.

Lynette PATTERSON, Plaintiff–Appellant,
v.
STATE of Idaho, DEPARTMENT OF HEALTH & WELFARE and John/Jane Does 1 through X, whose true identities are presently unknown, Defendants–Respondents.

No. 37416. | June 29, 2011.

Synopsis

Background: Former state employee brought action against her former employer, the Idaho Department of Health and Welfare (IDHW), alleging constructive discharge in violation of the Human Rights Act and the Protection of Public Employees Act. The District Court, Fourth Judicial District, Ada County, Michael R. McLaughlin, J., dismissed claims. Employee appealed.

Holdings: The Supreme Court, J. Jones, J., held that:
[1] IDHW did not waive statute of limitations defense;
[2] claim arose when employee tendered her resignation;
[3] employee's complaints were not protected activity; and
[4] employee's belief that employer was engaged in unlawful employment practices was not objectively reasonable.

Affirmed.

West Headnotes (22)

[1] **Appeal and Error**
⇐Extent of Review Dependent on Nature of Decision Appealed from

Supreme Court reviews the grant of a motion for summary judgment on the same standard used by the district court. Rules Civ.Proc., Rule 56(c).

[2] **Judgment**
⇐Presumptions and burden of proof

When considering a motion for summary judgment, disputed facts are liberally construed in favor of the nonmoving party and all reasonable inferences that can be drawn from the record are to be drawn in favor of the nonmoving party. Rules Civ.Proc., Rule 56(c).

[3] **Judgment**
⇐Existence or non-existence of fact issue

Summary judgment is appropriate where the nonmoving party bearing the burden of proof fails to make a showing sufficient to establish the existence of an element essential to that party's case. Rules Civ.Proc., Rule 56(c).

[4] **Limitation of Actions**
⇐Waiver or estoppel by failure to plead

Employer did not waive statute of limitations defense by failing to plead it as an affirmative defense in its answer to employee's complaint in action in which state employee alleged constructive discharge in violation of Idaho Human Rights Act (IHRA) and Idaho Protection of Public Employees Act (IPPEA), where employer raised the affirmative defense in its memorandum in support of its motion for summary judgment, and employee responded to defense in her opposition memorandum. West's I.C.A. §§ 6–2101, 67–5901; Rules Civ.Proc., Rule 8(c).

[5] **Pleading**
⇐Necessity for defense

A party does not waive an affirmative defense for failing to raise it in the initial answer, so long as it is raised before trial and the opposing party has time to respond in briefing and oral argument. Rules Civ.Proc., Rule 8(c).

[6] **Limitation of Actions**
Liabilities Created by Statute

State employee's claim for constructive discharge pursuant to the Idaho Protection of Public Employees Act (IPPEA) arose when employee provided unequivocal notice of her intent to resign, rather than on date her resignation became effective. West's I.C.A. §§ 6–2104, 6–2105(2).

[7] **Officers and Public Employees**
Grounds for removal

Idaho Protection of Public Employees Act (IPPEA) seeks to protect the integrity of the government by providing a legal cause of action for public employees who experience adverse action from their employer as a result of reporting waste and violations of a law, rule, or regulation. West's I.C.A. § 6–2101.

[8] **Officers and Public Employees**
Grounds for removal

For purposes of a claim pursuant to the Idaho Protection of Public Employees Act (IPPEA), where the alleged adverse action is a constructive discharge, a plaintiff must prove that working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign. West's I.C.A. § 6–2104.

1 Cases that cite this headnote

[9] **Civil Rights**
Activities protected
States
Appointment or employment and tenure of agents and employees in general

State employee's complaints regarding intra-office affair between her supervisor and her co-workers was not protected activity under the Idaho Human Rights Act (IHRA), and therefore employee failed to show the existence of a hostile work environment; although supervisor's conduct certainly violated employer's policy regarding intra-office relationships, and could well have resulted in paramour favoritism, the favoritism affected all concerned on a gender-neutral basis. West's I.C.A. § 67–5911.

[10] **Civil Rights**
Activities protected

The opposition clause protects employees who both subjectively and reasonably believe that they are opposing activity that violates Title VII. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e–3(a).

[11] **Civil Rights**
Hostile environment; severity, pervasiveness, and frequency

Pursuant to the Idaho Human Rights Act (IHRA), unlawful discrimination on the basis of sex includes the creation of a hostile work environment. West's I.C.A. § 67–5909.

[12] **Civil Rights**
Hostile environment; severity, pervasiveness, and frequency

Pursuant to the Idaho Human Rights Act (IHRA), in order to show that a work environment is sufficiently hostile, a plaintiff must show the occurrence of numerous improper acts which establish a pattern of conduct sufficiently severe or pervasive to alter the conditions of employment. West's I.C.A. § 67–5909.

[13] **Civil Rights**
Hostile environment; severity, pervasiveness, and frequency

The standard to prove a hostile environment under the Idaho Human Rights Act (IHRA) is that the environment is both subjectively and objectively perceived as hostile based on a totality of the circumstances. West's I.C.A. § 67–5909.

[14] **Civil Rights**
Activities protected
States
Appointment or employment and tenure of agents and employees in general

State employee's belief that employer was engaging in unlawful employment practices due to intra-office relationship between supervisor and employee's co-worker was not objectively reasonable, and therefore employee failed to maintain claim for retaliation pursuant to the Idaho Human Rights Act (IHRA); existing substantive law was to the contrary, employee training materials that were more restrictive than Title VII did not create a reasonable belief on the part of employee that conduct violated Title VII, and employee could base her good faith belief that employer had engaged in unlawful employment practices based on the good faith belief of another employee. West's I.C.A. § 67–5909; Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e–3(a).

[15] **Civil Rights**
Activities protected

A plaintiff can establish a prima facie case of retaliation under the opposition clause of Title VII if he shows that he had a good faith, reasonable belief that the employer was engaged in unlawful employment practices. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e–3(a).

[16] **Civil Rights**
Activities protected

In order to establish a retaliation claim under Title VII, a plaintiff must not only show that he subjectively, that is, in good faith, believed that his employer was engaged in unlawful employment practices, but also that his belief was objectively reasonable in light of the facts and record presented. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e–3(a).

[17] **Civil Rights**
Activities protected

It is not enough for a plaintiff to allege that his belief that his employer was engaged in unlawful employment practice was honest and bona fide; the allegations and record must also indicate that the belief, though perhaps mistaken, was objectively reasonable in order to establish a retaliation claim under Title VII. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e–3(a).

[18] **Civil Rights**
Activities protected

For purposes of establishing a retaliation claim under Title VII, a critical element of the inquiry regarding objective reasonableness of an employee's belief that she was participating in a protected activity is the existing case law at the time of the incident. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e–3(a).

[19] **Appeal and Error**
Reply briefs

Public employee failed to preserve for appellate review her assertion that her activities in complaining about intra-office relationship between supervisor and co-worker were protected activity pursuant to participation clause of the Idaho Human Rights Act (IHRA) and Title VII, where, although employee argued in her reply brief that she was entitled to relief under the participation clause, she did not make the same argument in her opening brief. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e–3(a); West's I.C.A. § 67–5909.

[20] **Appeal and Error**
Rulings by Lower Court

In order for an issue to be raised on appeal, the record must reveal an adverse ruling which forms the basis for an assignment of error.

[21] **Appeal and Error**
Necessity of presentation in general

Issues not raised below but raised for the first time on appeal will not be considered or reviewed.

[22] **Appeal and Error**
Form and requisites in general
Appeal and Error
Points and arguments

In order to be considered by the Supreme Court, the appellant is required to identify legal issues and provide authorities supporting the arguments in the opening brief. Appellate Rule 35.

Attorneys and Law Firms

**721 Johnson & Monteleone, L.L.P., Boise, for appellant. Jason R.N. Monteleone argued.

Honorable Lawrence Wasden, Attorney General, Boise, for respondents. Brian B. Benjamin argued.

Opinion

J. JONES, Justice.

*313 Lynette Patterson appeals the dismissal of her claims against her former employer for alleged violation of the Idaho Human Rights Act and the Idaho Protection of Public Employees Act. We affirm.

I.

Factual and Procedural History

This is a constructive discharge case arising under the Idaho Human Rights Act (IHRA), I.C. § 67–5901 *et seq.*, and the Idaho Protection of Public Employees Act (IPPEA), I.C. § 6–2101 *et seq.* Appellant, Lynette Patterson, argues that she was constructively discharged from her position as the Program Supervisor of the Fraud Unit at the Idaho Department of Health and Welfare (IDHW) due to her complaints regarding an intra-office

romance between her supervisor, Mond Warren (Warren), and a lateral employee, Lori Stiles (Stiles). Stiles was the Program Supervisor of the Surveillance Utilization and Review Unit (SUR Unit) and Warren was the direct supervisor for both Stiles and Patterson. Patterson made multiple complaints regarding the relationship and favoritism, which she alleges resulted in her first negative performance review with IDHW, culminating in a constructive discharge.

IDHW had an internal policy discouraging intra-office relationships. Its manual provided the following guidance on such relationships:

> *Cohabitation and Romantic Relationships.* Cohabitation of and/or romantic relationships between employees and their supervisors and others holding positions of authority over them is not condoned. If such relationships exist, the disciplinary action such as involuntary transfer may be considered. The possibility of intentional, unintentional or perceived abuse of power should be strongly considered in such relationships.

Patterson's first complaint regarding the affair and preferential treatment came in the fall of 2004. Patterson went to Human Resource (HR) Specialist Bethany Zimmerman (Zimmerman) and told her that Warren and Stiles were having an affair and, as a result of the affair, "Warren was not treating her fairly." As a result of this complaint and others, Zimmerman and Warren's direct supervisor, David Butler (Butler), confronted Stiles, but Stiles denied the existence of the affair. Butler and Zimmerman conducted an interview with Warren who similarly denied the allegation. Two months later, Zimmerman again went to Butler to alert him to ongoing rumors regarding the inappropriate relationship and preferential treatment. Thereafter, Butler and another HR employee questioned Warren about the relationship for a second time, but he again denied the affair. However, several days after this second interview, Warren went to Butler and admitted to having had an intimate relationship with Stiles some five years previously (in approximately 1999 or 2000). The relationship was said to have lasted one year, with sporadic intimate encounters thereafter.

After Warren admitted to the romantic relationship, IDHW Civil Rights Department Manager Heidi Graham (Graham) conducted ***314 **722** an investigation regarding the complaints of preferential treatment. Graham interviewed Patterson on December 28, 2004. During the interview, Patterson alleged that the SUR Unit received preferential treatment, including better pay, better equipment, access to evidence rooms, more recognition, and preferential disciplining of subordinate employees. Graham's investigation concluded that Warren and Stiles had engaged in a romantic relationship but also concluded that there was no evidence to support the allegations of preferential treatment. "[A]ny differences complained of by Fraud Unit staff and Ms. Patterson regarding the SUR Unit were either inconsequential, were based on perception and lacked factual bases, were the result of legitimate program needs or were merely territorial rivalries between the two groups."

At the conclusion of the investigation, Employee Relations Manager Monica Young (Young) met with Patterson to discuss the investigation outcome. After explaining Graham's conclusions, Young noted that Patterson was upset that Graham "was lied to and fell for it" and

> wanted to know where she could complain and I told her she could file a complaint with the Idaho Human Rights Commission or consult with an attorney. She told me she knew she would be retaliated against. .... She cut me off before I could finish and said she could talk about [Ms. Stiles and Mr. Warren having an affair] if it was impacting her and other's work and she stormed out of my office.

Because Warren had been dishonest about the relationship, a "Notice of Employment Status" letter was placed in his permanent employee file. This letter indicated that "the work environment in the unit is disruptive, dysfunctional, and laden with mistrust, resentment, and anger." However, Warren retained his position as Bureau Chief, and as the supervisor of both Stiles and Patterson.

In February of 2005, Butler attended a Fraud Unit meeting at Patterson's request, wherein staff voiced concerns regarding the alleged relationship and preferential treatment. The Fraud Unit provided Butler with an "Issues Memorandum" describing the concerns of the unit, and Patterson personally provided Butler with an additional document entitled "Summary of Issues Fraud and Sur Units." After further discussions between Butler and Graham, Butler decided not to re-open the investigation because there were no new allegations raised in the complaints.

Patterson had a performance review in May of 2005, approximately three months after the meeting with Butler, wherein she received "Achieves Performance Standards" but it was noted that she had not completed one performance objective.1 Patterson strenuously objected to the notation and attached a personal explanation to the performance review.

Patterson met with Graham again on May 25, 2005, alleging "that there was retaliation and 'hostility' between the Fraud and SUR Units." Patterson further stated that "things had gotten worse since [Graham's December 2004] investigation had concluded." However, no new investigation resulted from these allegations.

On September 27, 2006, Patterson met with the new Director of IDHW, Richard Armstrong (Armstrong), to discuss her allegations of preferential treatment. Patterson told Armstrong that she "felt discriminated against in that she and the employees in her Fraud unit did not get an equal amount of resources (as the SUR unit) and were not getting the recognition of good work that she felt was being done by the members in the Fraud unit." She also made allegations of unequal pay. Following his meeting with Patterson, Armstrong met separately with Butler and Graham to discuss Patterson's complaints. He met with Patterson again on November 22, 2006, indicating that her concerns had been adequately investigated and, since no new incidents had occurred, he did not intend to reopen the previous investigation.

Approximately four months later, Warren gave Patterson a draft performance evaluation ***315 **723** which rated her as "Does Not Achieve Performance Standards." This document specifically identified staff involvement in searches and continued use of deferred prosecution agreements as the basis for the negative review. This document was provided to Patterson on March 16, 2007, via an e-mail in which Warren requested a 2:00 p.m. meeting to discuss the evaluation. Patterson typed a resignation note before attending the afternoon meeting. The note stated, in relevant part:

> Please consider this as my resignation from the Department of Health and Welfare Fraud Unit. After 25 ½ years with the state, I can no longer work under these conditions. The work environment has become increasingly hostile over the past few years. Retaliation is becoming unbearable. For health concerns and my own peace of mind, I am resigning effect[ive] March 30, 2007 and will be taking vacation from now until then.
>
> I have left keys, badges, ID etc. with Susan Slade Grossl.

Patterson did not return to work after March 16, 2007.[2]

On September 14, 2007, Patterson filed a complaint with the Idaho Human Rights Commission (IHRC), alleging sexual discrimination and retaliation. On September 25, 2007, Patterson filed her initial complaint in district court alleging violations of the IPPEA. Subsequently, Patterson amended this complaint by adding an unlawful retaliation claim in violation of the IHRA. IDHW moved for summary judgment on both claims, which the court granted because: (1) Patterson did not file her IPPEA claim within 180 days of her constructive discharge on March 16, 2007; and (2) Patterson failed to demonstrate that she engaged in protected activity in order to sustain her IHRA claim. Patterson moved for reconsideration on the IHRA claim, but the district court denied her motion. She timely appealed to this Court.

II.

Issues on Appeal

I. Is Patterson's IPPEA claim time-barred?

II. Did the district court err in determining that Patterson failed to demonstrate that she was engaging in protected activity under the IHRA?

III.

Discussion

A. Standard of Review

[1] [2] [3] This Court reviews the grant of a motion for summary judgment on the same standard used by the district court. *Mackay v. Four Rivers Packing Co.,* 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008). Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). Disputed facts are liberally construed in favor of the nonmoving party and "all reasonable inferences that can be drawn from the record are to be drawn in favor of the nonmoving party." *Mackay,* 145 Idaho at 410, 179 P.3d at 1066. "Summary judgment is appropriate where the nonmoving party bearing the burden of proof fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Id.*

B. Patterson's IPPEA claim is time-barred.

Patterson contends the district court erred in dismissing her IPPEA claim on statute of limitations grounds, both because IDHW waived any statute of limitations defense and because, even if it did not, her complaint on this claim was timely filed. Patterson first argues IDHW waived any statute of limitations defense regarding her IPPEA claim because it was not pleaded as an affirmative ***316 **724**

defense in IDHW's initial answer to her complaint. Patterson next argues that, even if the defense was not waived, her complaint was timely filed and the district court erred in using the notification date of her resignation, on March 16, 2007, rather than the effective date of her resignation, on March 30, 2007, as the appropriate accrual date for her IPPEA claim. IDHW argues it properly raised the statute of limitations defense at the time of the summary judgment proceedings and, therefore, never waived the issue. Additionally, IDHW argues that the relevant accrual date for Patterson's IPPEA claim is the date she provided her notice of resignation because she communicated her intent to resign on that date, and it was the last time IDHW could have engaged in unlawful employment activity.

The district court ruled that IDHW did not waive its statute of limitation defense, even though it was not pleaded in the answer to the complaint, because Patterson had the opportunity to fully argue the issue before trial. The court then determined that Patterson's constructive discharge claim was untimely filed on September 25, 2007, because it accrued on March 16, 2007, when the "atmosphere at work was so intolerable she could stay no longer and had to resign." The court rejected Patterson's allegation that the adverse actions constituted a continuing incident, culminating with the effective date of her resignation on March 30, 2007, because the constructive discharge was a discrete act.

[4] [5] Idaho Rule of Civil Procedure 8(c) provides that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively" a statute of limitations defense. This Court has interpreted IRCP 8(c) as requiring affirmative defenses to be plead, but without identifying the consequences for failing to do so. *Fuhriman v. State, Dep't of Transp.,* 143 Idaho 800, 803–04, 153 P.3d 480, 483–84 (2007). In *Fuhriman,* the Court held that the State's failure to raise the affirmative defense of statutory employer immunity, until filing its memorandum in support of its motion for summary judgment, was not fatal to that defense. *Id.* at 804, 153 P.3d at 484. The Court determined that because the State's memorandum alerted the appellants to the affirmative defense, and the appellants responded to this argument in reply briefing, as well as in oral argument before the district court, the defense had not been waived for failing to plead it in the initial answer. *Id. See also Bluestone v. Mathewson,* 103 Idaho 453, 455, 649 P.2d 1209, 1211 (1982) (finding no waiver of a statute of frauds defense where it was raised "for the first time in the summary judgment motion even though the reply to the counterclaim has been filed."). Therefore, pursuant to *Fuhriman,* a party does not waive an affirmative defense for failing to raise it in the initial answer, so long as it is raised before trial and the opposing party has time to respond in briefing and oral argument. Like the State in *Fuhriman,* IDHW raised its statute of limitations affirmative defense in its memorandum in support of its motion for summary judgment, and Patterson responded to this defense in her opposition memorandum. Consequently, IDHW did not waive its statute of limitations defense regarding Patterson's IPPEA claim.3

[6] [7] We next consider whether Patterson's claim was timely filed. The IPPEA seeks to protect the integrity of the government "by providing a legal cause of action for public employees who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation." *Van v. Portneuf Med. Ctr.,* 147 Idaho 552, 557, 212 P.3d 982, 987 (2009). To establish an IPPEA claim, a plaintiff must establish, by a preponderance of the evidence, "that the employee has suffered an adverse action because the employee, or a person acting on his behalf engaged or intended to engage in an activity protected ***317 **725** under section 6–2104, Idaho Code." I.C. § 6–2105(4). "An employee who alleges a violation of this chapter may bring a civil action for appropriate injunctive relief or actual damages, or both, within one hundred eighty (180) days after the occurrence of the alleged violation of this chapter." I.C. § 6–2105(2).

[8] Where the alleged adverse action is a constructive discharge, a plaintiff must prove that "working conditions bec[a]me so intolerable that a reasonable person in the employee's position would have felt compelled to resign [.]" *Waterman v. Nationwide Mut. Ins. Co.,* 146 Idaho 667, 672, 201 P.3d 640, 645 (2009). Assuming that Patterson met this evidentiary burden, this Court must determine whether her claim for constructive discharge arose with her resignation notice on March 16, or with the effective date of her termination on March 30. We hold that Patterson's IPPEA claim is untimely because her claim for constructive discharge arose on March 16 when she provided unequivocal notice of her intent to resign.

The Ninth Circuit has held that in constructive discharge cases, it is the date of resignation that starts the relevant statute of limitations period.

> We hold ... that the date of discharge triggers the limitations period in a constructive discharge case, just as in all other cases of wrongful discharge. Constructive discharge is, indeed, just one form of wrongful discharge. The fact that the actual act of terminating employment is initiated by the employee, who concludes that she is compelled to leave as a result of the employer's actions, rather than by the employer directly does not change the fact that the

> employee has been discharged. Therefore, if the date of [plaintiff's] quitting falls within the relevant period of limitations, as it unquestionably does here, her claim is timely filed.

Draper v. Coeur Rochester, Inc., 147 F.3d 1104, 1110 (9th Cir.1998).
Similarly, the Second Circuit has expanded on this holding and determined that a constructive discharge claim accrues on the date the employee gives "definite notice of her intention to retire," rather than upon the effective date of that resignation. *Flaherty v. Metromail Corp.*, 235 F.3d 133, 138 (2d Cir.2000). In *Flaherty,* the plaintiff submitted a formal statement to her employer on June 12, 1997, that she would be retiring from the corporation effective November 1, 1997. *Id.* at 139. The court held that the June 12 notification date was the date that the plaintiff "effectively communicated her intention to resign" and was, therefore, the relevant date for her constructive discharge claim. *Id.*

Like the plaintiff in *Flaherty,* wherein the court treated the resignation notice date as the appropriate accrual of the plaintiff's cause of action, rather than the effective date of her termination, Patterson gave IDHW definitive notice of her intent to resign on March 16, 2007, even though that resignation was not to become effective until March 30, 2007. Specifically, Patterson's resignation note stated that she could no longer work for IDHW due to the unbearable conditions to which she was subjected and that she would take vacation time until the effective date of her resignation. Indeed, Patterson turned in her keys and badge and did not return to work after her March 16 notice. IDHW was in no position to subject her to additional discriminatory treatment after that date. While Patterson points to documents created by IDHW, identifying her termination date as March 30, 2007, to establish her discharge date, the accrual of the constructive discharge claim is based on when the work environment became unbearable for the *employee,* not when the employer believed she was no longer employed there. Therefore, we affirm the decision of the district court that Patterson's IPPEA claim was time-barred under I.C. § 6–2105(2).

C. The district court did not err in determining that Patterson failed to demonstrate she was engaging in protected activity under the IHRA.

[9] Patterson alleges that her supervisor's intra-office affair and consequent favoritism toward his paramour's work group created a hostile work environment, that she opposed the actions creating that environment ***318 **726** and that, as a consequence, she was retaliated against in violation of the IHRA. She argues that, even if the affair and favoritism were not legally sufficient to constitute a hostile work environment, she engaged in protected activity in opposing such actions because she had a reasonable and good faith belief that they were violative of the IHRA. IDHW contends that the district court did not err in determining otherwise because overwhelming case law holds that paramour favoritism is not violative of Title VII and, therefore, opposition to such activity is not protected activity under the IHRA. The district court concluded, as a matter of law, that Patterson could not have reasonably believed her complaints regarding the intra-office romance and alleged favoritism amounted to protected activity under the opposition clause of the IHRA and Title VII because case law overwhelmingly holds that paramour favoritism is not proscribed activity.

The IHRA not only prohibits discriminatory actions against persons in protected groups, but also prohibits retaliation against persons who oppose such actions. Idaho Code § 67–5911 provides:

> It shall be unlawful for a person or any business entity subject to regulation by this chapter to discriminate against any individual because he or she has *opposed* any practice made unlawful by this chapter or because such individual has made a charge, testified, assisted, or *participated* in any manner in an investigation, proceeding, or litigation under this chapter.

(emphasis added). A claim under I.C. § 67–5911 is commonly referred to as a retaliation cause of action. There is no Idaho case law regarding a retaliation claim based on allegations of paramour favoritism. However, "[t]his Court has previously determined that the legislative intent reflected in I.C. § 67–5901 allows our state courts to look to federal law for guidance in the interpretation of the state provisions." *Mackay,* 145 Idaho at 413, 179 P.3d at 1069.
In order to make a prima facie retaliation claim, the Ninth Circuit Court of Appeals requires a plaintiff to demonstrate that: (1) she engaged in protected activity; (2) she suffered an adverse employment action; and (3) there is a causal link between the protected activity and the adverse employment action. *See E.E.O.C. v. Luce, Forward, Hamilton & Scripps,* 303 F.3d 994, 1005 (9th Cir.2002). "Protected activities include: (1) opposing an unlawful employment practice; and (2) participating in a statutorily authorized proceeding." *Id.*

[10] The opposition clause protects employees who both subjectively and reasonably believe that they are opposing

activity that violates Title VII. *Little v. United Technologies Carrier Transicold Div.,* 103 F.3d 956, 960 (11th Cir.1997). In this case, it is undisputed that Patterson subjectively believed that she engaged in protected opposition activity.4 Therefore, only the objective reasonableness of her belief is at issue before this Court.

[11] [12] [13] In determining whether it was objectively reasonable for Patterson to believe that she was engaging in protected opposition activity, we first consider whether a paramour relationship resulting in favoritism toward the paramour, in and of itself, constitutes unlawful conduct. The IHRA prohibits employers from discharging or otherwise discriminating against employees because of their race, color, religion, sex or national origin. I.C. § 67–5909. The relevant portion of this provision provides:

> It shall be a prohibited act to discriminate against a person because of, or on a basis of, race, color, religion, sex or national origin, in any of the following subsections....
>
> (1) For an employer ... to discharge, or to otherwise discriminate against an individual with respect to compensation or the terms, conditions or privileges of employment or to reduce the wage of any employee in order to comply with this chapter....

Id. Unlawful discrimination on the basis of sex includes the creation of a hostile work environment. "In order to show that a work ***319** ****727** environment is sufficiently hostile, a plaintiff must show the occurrence of numerous improper acts which establish a pattern of conduct sufficiently severe or pervasive to alter the conditions of employment." *Frazier v. J.R. Simplot Co.,* 136 Idaho 100, 105, 29 P.3d 936, 941 (2001). "[T]he standard to prove [a] hostile environment is that the environment is both subjectively and objectively perceived as hostile based on a totality of the circumstances." *Jeremiah v. Yanke Mach. Shop, Inc.,* 131 Idaho 242, 248, 953 P.2d 992, 998 (1998) (internal quotation omitted).

Patterson claims that the affair and favoritism created a hostile work environment. However, based on our review of the record, we conclude that the activity alleged by Patterson is not sufficient to constitute a hostile work environment. Her supervisor's conduct certainly violated IDHW's policy regarding intra-office relationships, and could well have resulted in favorable treatment being received by Stiles and the SUR Unit, as Patterson alleges. However, as IDHW points out, the favoritism affected all concerned on a gender-neutral basis. That is, Patterson provides no evidence that either the romantic relationship or the alleged favoritism was directed against, or that the results had an unfavorable effect upon, a person or group protected by the IHRA.

Although none of this Court's decisions have dealt specifically with a paramour favoritism case, previous cases have dealt with the issue of hostile work environment. In *Fowler v. Kootenai County,* 128 Idaho 740, 918 P.2d 1185 (1996), while we rejected a contention that "if an employer equally abuses men and women no claim would arise [under the IHRA] because both sexes are accorded equal treatment," we held that the effect of abusive activity upon persons in a protected group is the critical factor in determining whether a hostile work environment has been shown. *Id.* at 744–45, 918 P.2d at 1189–90. We stated, "Title VII is aimed at the consequences or effects of an employment practice and not at the ... motivation of co-workers or employers." *Id.* (quoting *Ellison v. Brady,* 924 F.2d 872, 880 (9th Cir.1991)). In this case, Patterson has failed to present facts to show that the effect of the affair and alleged favoritism on her or other women in her unit was such that it created a hostile work environment. While the affidavit she submitted in opposition to IDHW's motion for summary judgment refers to and incorporates a large volume of meeting notes, emails, pay records, and other documents, and asserts a number of instances of favoritism toward the SUR Unit, it fails to provide narrative testimony as to how Patterson or other women were adversely impacted by the same. Patterson's affidavit provides little guidance regarding the sequence of events that led to her unfavorable performance review and resignation.

Strongman v. Idaho Potato Commission, 129 Idaho 766, 932 P.2d 889 (1997), also dealt with a hostile work environment claim. There, the Court held that, "[s]exual conduct is not a necessary element of a hostile environment claim based on gender-specific discrimination." *Id.* at 770, 932 P.2d at 893. In that case, the Court held that the district court erred in dismissing the plaintiff's hostile work environment claim on summary judgment because the plaintiff had presented evidence indicating "that not only was [she] treated differently than her male counterparts in the amount of travelling she was required to do, but that her job was relocated to a city to which the director knew the employee would not move, and that she was criticized for taking sick leave." *Id.* at 771, 932 P.2d at 894. Once again, Patterson has failed to present specific facts showing that she or other members of a protected group were subjected to abusive treatment that would constitute a hostile work environment. What her allegations boil down to, in essence, is that her supervisor had a relationship with a lateral employee, resulting in more favorable treatment for the paramour and her unit.

Where courts in other jurisdiction have dealt specifically with the issue, the overwhelming weight of the decisions is

that paramour favoritism does not violate Title VII. *See DeCintio v. Westchester County Med. Ctr.,* 807 F.2d 304, 308 (2d Cir.1986) (finding that paramour favoritism does not constitute gender discrimination because it affects men and women equally). While the federal Equal Employment Opportunities ***320 **728** Commission and some federal courts recognize limited exceptions to this rule where (1) paramour favoritism is a result of coerced sexual behavior, in which case, the quid pro quo analysis of sexual harassment would apply; or (2) the paramour activity is so widespread that there is an expectation of sexual favors in exchange for advancement or promotion in the workplace, Patterson's allegations do not fall within either of these limited exceptions and, therefore, a claim for hostile work environment would not lie here. *See* EEOC, *Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism,* No. 915.048, 1990 WL 1104702 at *2–3 (Jan. 12, 1990).

[14] [15] [16] [17] However, that is not the end of our inquiry. Patterson's claim is not for a hostile work environment but, rather, for retaliation as a result of her complaints about the work environment resulting from the affair and favoritism. Because a hostile work environment claim is distinct from a retaliation claim, some courts have found that, even where a plaintiff fails to demonstrate a hostile work environment, the plaintiff's retaliation claim may proceed to the jury based on her reasonable belief that she engaged in protected activity. *See Drinkwater v. Union Carbide Corp.,* 904 F.2d 853, 865–66 (3rd Cir.1990) (despite the fact that plaintiff failed to demonstrate a hostile work environment claim, the court allowed her retaliation claim to go to the jury because she believed the activity was prohibited and because there was case law in existence at the time of her opposition activity that arguably supported the reasonableness of her belief that paramour favoritism violated Title VII). As articulated in *United Technologies:*

> [a] plaintiff can establish a prima facie case of retaliation under the opposition clause of Title VII if he shows that he had a good faith, reasonable belief that the employer was engaged in unlawful employment practices.... It is critical to emphasize that a plaintiff's burden under this standard has both a subjective and an objective component. A plaintiff must not only show that he subjectively (that is, in good faith) believed that his employer was engaged in unlawful employment practices, but also that his belief was objectively reasonable in light of the facts and record presented. It thus is not enough for a plaintiff to allege that his belief in this regard was honest and bona fide; the allegations and record must also indicate that the belief, though perhaps mistaken, was objectively reasonable.

103 F.3d at 960 (emphasis omitted)

Patterson argues her belief that she was engaging in protected activity was objectively reasonable because: (1) she filed a complaint with the IHRC and she personally complained and participated in the internal investigation regarding the affair and alleged preferential treatment and (2) IDHW treated her complaints as potential violations of Title VII of the federal Civil Rights Act of 1964 by referring Patterson to the civil rights investigator and by providing her training materials indicating that paramour favoritism could be illegal. IDHW argues that Patterson's factual allegations do not support the reasonableness of her belief because: (1) Patterson's complaints to IDHW, as well as her IHRC complaint, do not support a finding that her belief was objectively reasonable; (2) the IDHW training materials provide that discrimination must be because of the victim's gender and these materials cannot create a heightened standard for Title VII violations; (3) Patterson's allegations of unequal pay affected both the men and women in Patterson's fraud unit equally; and (4) Patterson cannot form an objective belief that her activity is protected based on discussions with third parties.

The district court agreed with the arguments advanced by IDHW, finding that Patterson's belief was not objectively reasonable because: (1) existing substantive law was to the contrary; (2) employee training materials that are more restrictive than Title VII do not create a reasonable belief on the part of an employee that conduct violates Title VII; and (3) an employee cannot base her good faith belief that an employer has engaged in unlawful employment practices based on the good faith belief of another employee. The district court also pointed out that Patterson had failed to demonstrate that the alleged favoritism was due to plaintiff's, or any other ***321 **729** person's, gender. As the court stated, "In sum, the Court is not aware of any evidence in the record demonstrating that the Plaintiff drew a connection between the affair and the favoritism and a violation of the IHRA, be it gender or sex discrimination or otherwise. In fact, common sense dictates that any adverse actions stemming from the affair and favoritism of the SUR Unit would have fallen upon male and female fraud investigators alike."

[18] A critical element of the inquiry regarding objective reasonableness of an employee's belief that she was participating in a protected activity is the existing case law at the time of the incident. In *Drinkwater,* the plaintiff's

claim was allowed to proceed because of an existing decision favorable to her position. The *Drinkwater* court noted, however, that that holding had been vacated after Drinkwater's case arose. *Id.* at 865–66. The only case favorable to her position that Patterson cited was decided a month and a half after her letter of resignation and could not have been relied upon in making her determination as to the reasonableness of her belief that she was engaging in protected activity. *See Alaniz v. Peppercorn,* 2007 WL 1299804 (E.Dist.Cal. May 3, 2007). Because the great weight of the case law did not support Patterson's position, she had no grounds to believe that she was engaging in protected activity. *See Luce,* 303 F.3d at 1006 (a plaintiff's belief that she engaged in protected opposition activity cannot be reasonable when faced with voluminous case law to the contrary); *Clover v. Total Sys. Servs., Inc.,* 176 F.3d 1346, 1351 (11th Cir.1999) ("The objective reasonableness of an employee's belief that her employer has engaged in an unlawful employment practice must be measured against existing substantive law."). The district court did not err in dismissing Patterson's IHRA claim.

[19] Patterson also argues that her activities were protected activity under the participation clause of the IHRA and Title VII because she complained to human resources personnel, as well as to the civil rights investigator at IDHW, regarding the alleged favoritism and retaliatory treatment. An employee can engage in protected activity by participating in the statutory proceedings created by Congress to assist in Title VII violations. "Title VII ... make[s] it unlawful for an employer to discriminate or retaliate against an employee or an applicant for employment because that person has made a charge, testified, assisted, or participated, in any manner in a proceeding." *Luce,* 303 F.3d at 1006 (internal quotation omitted). A "proceeding includes instituting a civil action," and also extends to an employee "who informs his employer of his intention to participate in a statutory proceeding, even if he has not yet done so." *Id.* at 1006–07 (internal quotation omitted).

[20] [21] [22] Although Patterson argues in her reply brief that she was entitled to relief under the participation clause, she did not make the same argument in her opening brief. It is true that she made reference to having participated in the investigations precipitated by her complaints, but her argument was premised on the opposition clause. Her arguments before the district court were premised on the opposition clause and that is the basis upon which the district court appears to have ruled. "It is well established that in order for an issue to be raised on appeal, the record must reveal an adverse ruling which forms the basis for an assignment of error." *Krempasky v. Nez Perce County Planning & Zoning,* 150 Idaho 231, 236, 245 P.3d 983, 988 (2010). "Issues not raised below but raised for the first time on appeal will not be considered or reviewed". *Id.* Further, "In order to be considered by this Court, the appellant is required to identify legal issues and provide authorities supporting the arguments in the opening brief." *Hogg v. Wolske,* 142 Idaho 549, 557, 130 P.3d 1087, 1095 (2006) (citing I.A.R. 35). This requirement ensures that the respondent has an opportunity to respond to the appellant's arguments. *See Suitts v. Nix,* 141 Idaho 706, 708, 117 P.3d 120, 122 (2005). Patterson failed to raise her participation clause argument in her opening brief, which denied IDHW the opportunity to respond.

IV.

Conclusion

We affirm the judgment of the district court.[5] Costs to IDHW.

*322 **730 Chief Justice EISMANN, and Justices BURDICK, W. JONES and HORTON concur.

Parallel Citations

256 P.3d 718

Footnotes

1 Prior to giving Patterson her May 2005 performance review, Zimmerman reviewed the rating and concluded it was appropriate and supported by documentation.

2 By precipitously resigning, Patterson elected to forego pursuit of statutory remedial procedures available to state employees. Employee problem solving and due process procedures are mandated by I.C. § 67–5315 and provided for in Rule 200 of the Rules of the Division of Human Resources & Idaho Personnel Commission (IDAPA 15.04.01.200).

3 Patterson cites *Mortensen v. Stewart Title Guar. Co.,* 149 Idaho 437, 443, 235 P.3d 387, 393 (2010) for the proposition that unpleaded *claims* cannot be preserved for appeal. However, *Mortensen* clearly addresses claims, rather than affirmative defenses, and this Court has stated that the *Fuhriman* and *Bluestone* cases speak only to "when an affirmative defense may be properly raised

and thus provides no basis for a different result" regarding a cause of action not raised in the initial pleadings. *Edmondson v. Shearer Lumber Prods.*, 139 Idaho 172, 178–79, 75 P.3d 733, 739–40 (2003). Thus, *Mortensen* is of no consequence to the situation at issue in this case.

4 The district court noted that "[t]he Court fully credits the Plaintiff's assertion throughout this litigation that she believed in good faith the conduct she opposed was unlawful."

5 The district court's judgment contained a Rule 54(b) certificate stating that the judgment was final with regard to the issues dealt with therein. It is unclear why a Rule 54(b) certification was required because the complaint only raised the IPPEA and IHRA claims, both of which were dismissed upon summary judgment. It appears the Rule 54(b) certificate was superfluous, as all issues were resolved by the judgment and the case has been fully disposed of on appeal.

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329 F.3d 740
United States Court of Appeals, Ninth Circuit.

Charles R. POTTENGER, Plaintiff-Appellant, v. POTLATCH CORPORATION, a Delaware corporation, Defendant-Appellee.

No. 02-35235. | Argued and Submitted March 4, 2003. | Filed May 19, 2003.

Former employee brought action against his former employer, alleging that he was forced to retire in violation of the Age Discrimination in Employment Act (ADEA) and the Idaho Human Rights Act and setting forth state law claims for intentional infliction of emotional distress and defamation. The United States District Court for the District of Idaho, Edward J. Lodge, J., granted summary judgment to employer, and employee appealed. The Court of Appeals, William A. Fletcher, Circuit Judge, held that: (1) employee sufficiently made out prima facie case of age discrimination under the ADEA; (2) employer met burden of articulating legitimate, nondiscriminatory reason for terminating employee; (3) evidence was insufficient to demonstrate that employer's proffered reason for firing employee was pretext for age discrimination; (4) under Idaho law, employer's statement was not defamatory; and (5) under Idaho law, employee's allegations were insufficient to support claim of intentional infliction of emotional distress.

Affirmed.

West Headnotes (21)

[1] Federal Courts
Trial De Novo

The Court of Appeals reviews a grant of summary judgment de novo.

1 Cases that cite this headnote

[2] Civil Rights
Discharge or Layoff

Evidence that employee was 60 years old, that employee's last performance review was satisfactory, and that employee was discharged and replaced by a younger employee with equal or inferior qualifications was sufficient to make out prima facie case of age discrimination under the ADEA. Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1).

5 Cases that cite this headnote

[3] Civil Rights
Disparate Treatment

To prove age discrimination in violation of the ADEA under a disparate treatment theory, an employee must show that his age actually played a role in the employer's decisionmaking process and had a determinative influence on the outcome. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

5 Cases that cite this headnote

[4] Civil Rights
Discharge or Layoff

Employer met burden of articulating legitimate, nondiscriminatory reason for terminating 60-year-old employee, as required to rebut prima facie case of age discrimination under the ADEA, where employee claimed that reason for termination was a lack of confidence that employee could make the hard decisions necessary to turn around the ailing plant that employee headed, which had lost large amounts of money over the past four years. Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1).

10 Cases that cite this headnote

[5] Civil Rights

Motive or Intent; Pretext

Evidence that employee's last performance review included positive comments, and that meeting in which decision was made to terminate employee was brief, was insufficient to demonstrate that employer's proffered reason for firing employee, that employee could not make decisions necessary to turn around ailing plant that employee headed, was pretext for age discrimination in violation of ADEA; review contained negative comments specifically singling out concerns with employee's management, process of evaluation and deliberation prior to termination was much longer than final meeting, and employer did not have required procedure for discharging management. Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1).

6 Cases that cite this headnote

[6] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Fundamentally different justifications for an employer's action give rise to a genuine issue of fact with respect to pretext in an ADEA action, precluding summary judgment. Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1).

4 Cases that cite this headnote

[7] **Civil Rights**
Disparate Treatment

Supervisor's remarks, referring to an "old management team," an "old business model," and "deadwood," in relation to 60-year-old employee, were insufficient to show discriminatory motive required for employee's disparate treatment age discrimination claim under the ADEA for his termination. Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1).

2 Cases that cite this headnote

[8] **Civil Rights**
Age Discrimination

Statistical analysis of employer's reduction in force plan (RIF) was insufficient to support inference of age discrimination in employee's age discrimination action for alleged disparate treatment under the ADEA in connection with his termination; analysis took into account only two variables, including the employee's age at the time of the RIF and whether the employee was terminated, and did not consider other relevant variables, such as job performance, which were available to employee. Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1).

8 Cases that cite this headnote

[9] **Civil Rights**
Admissibility of Evidence; Statistical Evidence

A plaintiff may use statistics to show an intent to discriminate under the ADEA. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[10] **Civil Rights**
Age Discrimination

Fact that 60-year-old employee's replacement was only 43 years old and that shortly before employee's discharge, employer moved a younger employee, who held a higher position, ahead of him on the successor list for promotion, without more, was insufficient to create inference of discriminatory motive required to support claim of disparate treatment age discrimination under the ADEA. Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A.

§ 623(a)(1).

4 Cases that cite this headnote

[11] **Civil Rights**
Age Discrimination

Statistical analysis of employer's reduction in force plan (RIF) was insufficient to support inference of age discrimination in employee's age discrimination action for alleged disparate impact under the ADEA, although analysis did tend to show at least some relationship between age and termination, where employee was not subject to, nor terminated as part of, the RIF, which was not put into place until a month after employee was terminated and applied only to lower-level employees. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

3 Cases that cite this headnote

[12] **Civil Rights**
Disparate Impact

A disparate impact claim challenges employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.

5 Cases that cite this headnote

[13] **Civil Rights**
Disparate Impact

To make out a prima facie case of disparate impact under the ADEA, a plaintiff must show: (1) the occurrence of certain outwardly neutral employment practices, and (2) a significantly adverse or disproportionate impact on persons of a particular age produced by the employer's facially neutral acts or practices. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

12 Cases that cite this headnote

[14] **Civil Rights**
Disparate Impact

A disparate impact claim under the ADEA must challenge a specific business practice. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

4 Cases that cite this headnote

[15] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Summary judgment is appropriate on a claim of disparate impact age discrimination under the ADEA when statistics do not support a disparate impact analysis. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

14 Cases that cite this headnote

[16] **Libel and Slander**
Employees

Under Idaho law, employer's statement that employee "elected to take early retirement," even if false, was not defamatory.

[17] **Libel and Slander**
Actionable Words in General

Under Idaho law, defamatory statements are actionable without allegation and proof of special damages if they impute to the plaintiff: (1) a criminal offense; (2) a loathsome disease; (3) a matter incompatible with his trade, business,

profession, or office; or (4) serious sexual misconduct.

[18] **Libel and Slander**
Nature and Meaning in General

Under Idaho law, even if employee alleged special harm stemming from statement by employer in notice to remaining employees that employee "elected to take early retirement," when in actuality employee was terminated, was insufficient to support claim of defamation per quod; although employee claimed that a reader could infer that he had committed some misdeed and was therefore terminated immediately, the notice stated that the retirement became effective a week from that time, and there was no evidence that anyone misconstrued the notice or that anyone would.

[19] **Libel and Slander**
Special Damages

Under Idaho law, in order to state a claim for defamation per quod, the plaintiff must allege and prove that some special harm resulted from the statement.

1 Cases that cite this headnote

[20] **Damages**
Other Particular Cases

Under Idaho law, employee's allegations that employer's conduct in firing him was outrageous because he worked for employer for 32 years, was not given an opportunity to save face, and because people might infer he was discharged for misconduct or that he was "deadwood," were insufficient to support claim of intentional infliction of emotional distress against employer.

1 Cases that cite this headnote

[21] **Damages**
Elements in General

In order to prove intentional infliction of emotional distress under Idaho law, plaintiff must show that defendant's conduct was extreme and outrageous and either intentionally or recklessly caused severe emotional distress.

1 Cases that cite this headnote

Attorneys and Law Firms

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Appeal from the United States District Court for the District of Idaho; Edward J. Lodge, District Judge, Presiding. D.C. No. CV-00-00612-EJL.

Before: REINHARDT, W. FLETCHER and GOULD, Circuit Judges.

Opinion

OPINION

WILLIAM A. FLETCHER, Circuit Judge:

Charles R. Pottenger worked for the Potlatch Corporation, a diversified forest products company, for 32 years until he was discharged in April 2000 at age 60. During his tenure at Potlatch, Pottenger rose to Group Vice President of Pulp and Paper, reporting directly to Potlatch's President, Richard Paulson. After his dismissal, Pottenger sued Potlatch alleging that he was forced to retire in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, and the Idaho Human Rights Act, Idaho Code §§ 67-5901 *et seq.* Pottenger also claims intentional infliction of emotional distress and defamation under Idaho law. The district court dismissed all

Pottenger's claims on summary judgment, and we affirm.

I

Pottenger joined Potlatch in 1968 after receiving his Ph.D. in paper technology. He held a variety of positions in the company, generally moving up through the ranks. In 1993, he became a group vice president, and at the date of his termination he was Group Vice President of Pulp and Paper. As a group vice president, Pottenger reported directly to the President and Chief Operating Officer of Potlatch, Richard Paulson, who reported to the CEO, Pendleton Siegel. Pottenger worked in Lewiston, Idaho, and oversaw Potlatch's operations in Idaho and Arkansas, including the Idaho Pulp and Paperboard Division ("IPPD") based in Lewiston. After the cost of capital, IPPD lost $63.7 million in 1997, $67.4 million in 1998, $85.0 million in 1999, and $14.5 million in the first quarter of 2000.

In January 1999, shortly before he became president of Potlatch, Paulson attended an executive training course at the University of Michigan. After attending the training course, Paulson decided that Potlatch needed to make "real and significant" changes in order to improve its performance. On November 23, 1999, Pottenger and three of his colleagues responsible for pulp and paperboard met with Paulson in Spokane, Washington, to talk about turning the pulp and paperboard business around. At the meeting, Paulson characterized Pottenger and his team as an "old management team" using an "old business model."

In February 2000, Paulson gave Pottenger his performance review for 1999. Pottenger received an MR- rating. In the Potlatch rating system, MR+ means that the individual has more than met the requirements of the job. MR means that the individual has fully met the requirements of the job. MR- means that there is some reason for concern. MM means that *744 the individual has met the minimum requirements for the job. Out of twelve managers listed in Potlatch's records that year, two received MR+ ratings, six received MR ratings, three received MR- ratings, and one received an MM rating. On the review form, Paulson characterized Pottenger's strengths as "smart," "knows business," "loyal to Potlatch," "technical knowledge," "enthusiastic leader," and "wants Potlatch to succeed." He also wrote the following under areas for improvement: "break victim mentality in IPPD," "be a strong leader in stopping the 'mill town' mentality in Lewiston," "set higher expectations for people," and "think in terms of opportunities and develop change strategies to get there."

In March 2000, the Potlatch management committee, which included Pottenger, met to discuss cost-cutting strategies. Because the company was in financial trouble, the committee members made a commitment to each other to eliminate "deadwood," and to do so quickly. At the end of March, the committee distributed a memo announcing that the company was embarking on a course of significant change in response to poor earnings. The changes included a wide array of cost-cutting measures (including cuts in travel, mail, cell phone, and trade association expenses). The memo also announced that over the next two months the committee would be "evaluating where to make significant reductions in the number of salaried positions."

The management committee met again on April 12, 2000, to discuss the company's plan for a reduction in force. During the day, Paulson and Siegel (Potlatch's CEO) met separately from the committee for 10-15 minutes to discuss Pottenger. Paulson described his concerns that Pottenger was not capable of bringing about real and significant change in the Lewiston operation. At their meeting, Paulson and Siegel decided to fire Pottenger.

Paulson told Pottenger of his termination on April 18, 2000. When Pottenger asked Paulson why he was being fired, Paulson stated that he lacked confidence that Pottenger had the commitment to make the hard decisions necessary to make Potlatch successful.[1] Paulson offered Pottenger an enhanced severance package as part of his termination. Without the enhancement, Pottenger was entitled to 52 weeks of severance pay (equaling his yearly base pay of $324,120) and one year of employee benefits (medical, dental, and life insurance). After a year, Potlatch would pay monthly retirement benefits of $15,134.74 and 75% of Pottenger's medical, dental, and life insurance premiums. The enhanced severance package included an additional 26 weeks of base pay (for a total of 78 weeks or $486,180) and an additional monthly payment thereafter of $5,401.74 (for a total monthly payment of $20,536.48). The enhanced package also offered fully-paid medical, dental, and life insurance until age 65 (the mandatory retirement age for executives at Potlatch), and 75% payment thereafter. In return for the enhanced severance package, Paulson asked Pottenger to sign a separation agreement waiving any claim under the Age Discrimination Employment Act.

The next day, the company distributed a memo to all employees from Paulson stating that Pottenger had "elected to take early retirement." Pottenger had declined Paulson's offer the previous day to help *745 write the notice. The memo stated that Craig Nelson, formerly the Consumer Products Division Vice President, was assuming Pottenger's position. At the time, Pottenger was 60 years old and Nelson was 43.

Pottenger ultimately declined the enhanced severance package and refused to waive his claims under the ADEA. He then brought suit in federal district court claiming age discrimination under the ADEA, 29 U.S.C. §§ 621 *et seq.*, and the Idaho Human Rights Act,2 Idaho Code § 67-5909, and claiming defamation and intentional infliction of emotional distress.

The district court granted Potlatch's motion for summary judgment. The court found that Pottenger had made out a prima facie case of age discrimination, but that Potlatch had articulated a legitimate, nondiscriminatory reason for discharging Pottenger-that he was not prepared to make the tough decisions necessary to turn around the Idaho Pulp and Paper Division. The court found that Pottenger had not raised a genuine issue of material fact concerning whether the reason articulated by Potlatch was pretext. Pottenger, the court noted, did not contest that IPPD lost money during his tenure as head of that division. Rather he attacked the company's decision to address the losses by replacing him. The court also rejected Pottenger's disparate impact age discrimination claim because of the unreliability of his statistical evidence.

The court also granted summary judgment against Pottenger on his defamation and intentional infliction of emotional distress claims. It found that the company's statement that Pottenger had "elected" early retirement did not constitute defamation *per se.* It concluded that Pottenger had not supported his intentional infliction of emotional distress claim because there was no evidence in the record tending to show that Potlatch's conduct was "extreme and outrageous."

[1] We review a grant of summary judgment de novo. *Frank v. United Airlines, Inc.,* 216 F.3d 845, 849 (9th Cir.2000).

II

A. Disparate Treatment Age Discrimination Claim

[2] [3] The ADEA makes it "unlawful for an employer ... to fail or refuse to hire or to discharge any individual [who is at least 40 years old] ... because of such individual's age." 29 U.S.C. § 623(a)(1). To prove age discrimination under a disparate treatment theory, Pottenger must show that his age " 'actually played a role in [Potlatch's decisionmaking] process and had a determinative influence on the outcome.' " *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 141, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (quoting *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993)). In evaluating age discrimination claims, we employ the familiar framework developed in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Wallis v. J.R. Simplot Co.,* 26 F.3d 885, 889 (9th Cir.1994).

[4] Pottenger has made out a prima facie case of age discrimination. He was 60 years old; his most recent performance review grade of MR- was not outstanding, but indicated that he was meeting the requirements of the job; he was discharged; and he was replaced by Craig ***746** Nelson, then 43 years old, a substantially younger employee with equal or inferior qualifications. *See Coleman v. Quaker Oats Co.,* 232 F.3d 1271, 1281 (9th Cir.2000). Potlatch, in turn, has articulated a legitimate, nondiscriminatory reason for terminating Pottenger: a lack of confidence that Pottenger could make the hard decisions necessary to turn around the ailing Idaho Pulp and Paperboard Division, which he headed. It is undisputed that IPPD lost over $200 million during 1997, 1998, 1999, and the first quarter of 2000. *See Reeves,* 530 U.S. at 142, 120 S.Ct. 2097 (holding that the employer's burden is one of production, not persuasion).

Pottenger may establish pretext through evidence showing that Potlatch's explanation is unworthy of belief or through evidence showing that discrimination more likely motivated its decision. Pottenger need not rely on only one type of evidence, and he has offered evidence both to cast doubt on Potlatch's credibility and to show a discriminatory motive. *Id.* at 143, 120 S.Ct. 2097; *Chuang v. Univ. of Cal. Davis, Bd. of Trs.,* 225 F.3d 1115, 1127 (9th Cir.2000). At the summary judgment stage, Pottenger's burden is not high. He must only show that a rational trier of fact could, on all the evidence, find that Potlatch's explanation was pretextual and that therefore its action was taken for impermissibly discriminatory reasons. If he does so, then summary judgment for Potlatch is inappropriate. *Wallis,* 26 F.3d at 889.

[5] [6] Pottenger advances several reasons that, in his view, undermine Potlatch's explanation of his discharge. They include positive comments in his performance review, shifting justifications for his dismissal, the brevity of the meeting at which the president and CEO reached their decision to discharge him, and the procedures followed in his termination. Considering all of Pottenger's evidence together, however, we conclude that he has not created a genuine issue of material fact. Pottenger's performance review did contain some positive comments, but it also contained negative comments specifically singling out concerns with his performance in managing IPPD. Potlatch's proffered explanation does not state that Pottenger was incompetent or a generally bad employee; rather, it states that Potlatch lacked confidence that Pottenger could help turn the company around. Instead of

casting doubt on Potlatch's explanation, the statements in the performance review are consistent with it. Moreover, although " 'fundamentally different justifications for an employer's action ... give rise to a genuine issue of fact with respect to pretext,' " *Payne v. Norwest Corp.,* 113 F.3d 1079, 1080 (9th Cir.1997) (quoting *Washington v. Garrett,* 10 F.3d 1421, 1434 (9th Cir.1993)), Pottenger has pointed to no evidence suggesting that Potlatch has ever offered a reason for his dismissal other than doubt about his commitment to making hard decisions to help the company.

Finally, the duration of the meeting between Paulson and Siegel at which they made the termination decision and the manner of Pottenger's discharge do not create a factual issue regarding the company's credibility. The meeting between Paulson and Siegel at which they ultimately made the decision to terminate Pottenger was short, but it obviously came at the end of a much longer process of evaluation and deliberation. There is also little evidence of an established formal or informal company procedure for discharging high-level employees. In fact, when Pottenger himself discharged the then-head of the Idaho Pulp and Paper Division in 1997, he did so in a manner similar to his own discharge. Potlatch's failure to follow some unspecified procedure in its treatment ***747** of Pottenger does not cast any doubt on its proffered reason for his termination.

[7] To show discriminatory motive, Pottenger states that Paulson made comments referring to an "old management team," an "old business model," and "deadwood." Remarks can constitute evidence of discrimination. The Supreme Court has held that telling an employee he "was so old [he] must have come over on the Mayflower" and "was too damn old to do [his] job" constituted evidence of age discrimination. *Reeves,* 530 U.S. at 151, 120 S.Ct. 2097 (alteration in original). We have found a triable issue of material fact when an employee was told upon applying for an executive position that the board "wanted somebody younger for the job," *Schnidrig v. Columbia Mach., Inc.,* 80 F.3d 1406, 1410-11 (9th Cir.1996), and, in a Title VII case, when an employee was told, during the period that he was otherwise eligible for a university position, that "two Chinks" in the department was "more than enough," *Chuang,* 225 F.3d at 1128. These remarks are clearly sufficient to support an inference that the decisionmaker acted in a discriminatory fashion. In other cases, we have held that some remarks lead to no reasonable inference of discrimination and thus no triable issue of material fact exists. We have found that a supervisor's comment about getting rid of "old timers" because they would not "kiss [his] ass" did not sufficiently support an inference of age discrimination, *Nidds v. Schindler Elevator Corp.,* 113 F.3d 912, 918-19 (9th Cir.1996), that a comment that "we don't necessarily like grey hair" constituted "at best weak circumstantial evidence" of discriminatory animus, *Nesbit v. Pepsico, Inc.,* 994 F.2d 703, 705 (9th Cir.1993), that the use of the phrase "old-boy network" is generally considered a colloquialism unrelated to age, *Rose v. Wells Fargo & Co.,* 902 F.2d 1417, 1423 (9th Cir.1990), and that an employer's comment describing a younger employee promoted over an older employee as a "bright, intelligent, knowledgeable young man" did not create an inference of age discrimination, *Merrick v. Farmers Ins. Group,* 892 F.2d 1434, 1438-39 (9th Cir.1990).

Paulson's remarks in this case do not sufficiently support an inference of age discrimination so as to create a triable issue of material fact that would defeat summary judgment. In the context of this case, the phrase "old business model," does not support an inference of age discrimination. Similar to the language in *Rose,* the phrase is a colloquialism not generally associated with the target's age. Nor does Paulson's use of the term "old management team" during the same meeting create a triable issue of fact. Similarly, the management committee's use of the term "deadwood" does not suggest age discrimination. The Oxford English Dictionary defines "deadwood" as "[a] person or thing regarded as useless or unprofitable; a hindrance or impediment." 4 Oxford English Dictionary 293 (2d ed.1989).

[8] **[9]** Pottenger also contends that the company's June 2000 reduction in force ("RIF") disproportionately affected older employees. However, the statistical analysis of the RIF offered by Pottenger is insufficient to raise a triable issue of discrimination. A plaintiff may use statistics to show an intent to discriminate. *See, e.g., Coleman,* 232 F.3d at 1282-83; *Rose,* 902 F.2d at 1423. Potlatch, however, objects to the use of statistics from the RIF because Pottenger's dismissal was not formally part of the RIF. Nevertheless, if Pottenger can show that age was a motivating factor in determining who would be terminated under the RIF, that would constitute circumstantial evidence of discrimination in his dismissal.

***748** Pottenger's statistical analysis of the RIF takes into account only two variables-the employee's age at the time of the RIF and whether the employee was terminated. The numbers show a statistically significant relationship between these two variables, but this court and others have treated skeptically statistics that fail to account for other relevant variables. *See Coleman,* 232 F.3d at 1283 (holding that to raise a triable issue of fact regarding pretext based solely on statistics, the statistics "must show a stark pattern of discrimination unexplainable on grounds other than age" (internal quotation marks omitted)); *see also Frank v. United Airlines, Inc.,* 216 F.3d 845, 856 (9th Cir.2000) ("An employer does not violate the ADEA by

discriminating based on a factor that is merely empirically correlated with age."); *Sheehan v. Daily Racing Form,* 104 F.3d 940, 942 (7th Cir.1997) (criticizing a statistical analysis showing a correlation between age and discharge for failing to take account of any other relevant variable and finding the statistics without evidentiary significance); *Rea v. Martin Marietta Corp.,* 29 F.3d 1450, 1456 (10th Cir.1994) ("[A] plaintiff's statistical evidence must focus on eliminating nondiscriminatory explanations for the disparate treatment by showing disparate treatment between *comparable* individuals." (internal quotation marks omitted)).

Pottenger's expert had data about other relevant variables besides age and termination status, yet his statistical analysis makes no attempt to take these variables into account. *See Coleman,* 232 F.3d at 1283; *Rose,* 902 F.2d at 1425. In addition, Pottenger declined the opportunity to make use of the variable most likely to have offered a legally appropriate explanation of why certain employees were selected for lay-off: job performance. Although job performance may have been an important factor in determining who would be laid off, Pottenger specifically acquiesced in the suggestion that obtaining data about individual employees' performance reviews was unnecessary. If Pottenger had had access to only two variables, we would be presented with a different case. But here, where Pottenger had or had access to additional relevant data and chose not to use it, we conclude that Pottenger's statistical analysis is insufficient to raise a triable issue of fact regarding pretext.

[10] Pottenger also argues discriminatory motive may be inferred from the fact that his replacement was only 43 years old and that shortly before his discharge the company moved a younger employee ahead of him on the successor list for CEO. Evidence that forms part of the prima facie case may also be considered to show that a proffered explanation is pre-textual. *Reeves,* 530 U.S. at 147, 120 S.Ct. 2097. Without more, however, the fact that Nelson was younger than Pottenger does not create a triable issue of pretext. Nor does the fact that the company moved a younger employee ahead of Pottenger on the CEO successor list suggest that Potlatch acted with any discriminatory motive, for that employee had held a higher position in the company than Pottenger.

We have considered all of Pottenger's evidence of pre-text and conclude that it does not refute Potlatch's basic rationale for Pottenger's termination-that IPPD was losing money and the company lacked faith that Pottenger was the one to turn IPPD around. Potlatch has leeway to make subjective business decisions, even bad ones. *See Coleman,* 232 F.3d at 1285; *Cotton v. City of Alameda,* 812 F.2d 1245, 1249 (9th Cir.1987). It may have been unfair (and perhaps unwise) for Potlatch to blame Pottenger for IPPD's losses, but it is not surprising that Pottenger's bosses would try to make a change in leadership ***749** in a division that was having such consistent trouble. We hold that Pottenger has not created a genuine factual issue of pretext and the district court properly dismissed his disparate treatment claim on summary judgment.

B. Disparate Impact Age Discrimination Claim

[11] **[12]** The Supreme Court has not addressed whether plaintiffs may bring disparate impact claims under the ADEA, but this circuit permits such claims. *See Katz v. Regents of the Univ. of Cal.,* 229 F.3d 831, 835 (9th Cir.2000); *Frank,* 216 F.3d at 856; *EEOC v. Local 350, Plumbers and Pipefitters,* 998 F.2d 641, 648 n. 2 (9th Cir.1993). A disparate impact claim challenges "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Int'l Bd. of Teamsters v. United States,* 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

[13] **[14]** To make out a prima facie case of disparate impact, Pottenger must show "(1) the occurrence of certain outwardly neutral employment practices, and (2) a significantly adverse or disproportionate impact on persons of a particular [age] produced by the employer's facially neutral acts or practices." *Katz,* 229 F.3d at 835 (quoting *Palmer v. United States,* 794 F.2d 534, 538 (9th Cir.1986)) (alteration in original). A disparate impact claim must challenge a specific business practice. The RIF would constitute such a practice. *See Rose,* 902 F.2d at 1424-25 (holding that Wells Fargo's policy of committing employment decisions in a RIF to the subjective discretion of its managers constituted a specific employment practice subject to disparate impact analysis).

[15] The district court found that Potlatch had discredited Pottenger's statistical evidence and therefore dismissed his disparate impact claim. Summary judgment is appropriate when statistics do not support a disparate impact analysis. *See Katz,* 229 F.3d at 835 (affirming summary judgment dismissal where the plaintiffs were "unable to set forth a substantial statistical disparity that would raise an inference of intentional discrimination"). To make out a prima facie case of disparate impact, Pottenger must show only that a facially neutral business practice had a significant adverse effect on older workers. *Arnett v. Cal. Pub. Employees Ret. Sys.,* 179 F.3d 690, 697 (9th Cir.1999), *vacated on other grounds,* 528 U.S. 1111, 120 S.Ct. 930, 145 L.Ed.2d 807 (2000). Pottenger's statistical

analysis of the RIF does tend to show at least some relationship between age and termination. It does not tend to show that age *motivated* RIF decisions, which is why it does not help Pottenger establish a disparate *treatment* claim. But such a showing of causation is not necessary for a prima facie case of disparate *impact*.

In the context of this case, Pottenger's disparate impact claim nonetheless fails because Pottenger was not terminated as part of the RIF. When Potlatch discharged Pottenger in April, the RIF was under consideration, but it did not actually begin until June. Pottenger argues, however, that his discharge was functionally part of the RIF because the enhanced severance package offered to him was similar in structure (though not in dollar amount) to that suggested for use in the RIF, and because he was given 45 days to consider the package, as had been suggested for employees subject to the RIF. Pottenger acknowledges, however, that when Potlatch terminated him, the company did not use the objective, four-step evaluation process used to identify employees to be terminated ***750** as part of the RIF. Moreover, Pottenger was a high-level executive, while the RIF targeted rank-and-file employees. To bring a disparate impact claim, Pottenger must show that he was subject to the particular employment practice with the alleged disparate impact. Because Pottenger was not formally or functionally subject to the RIF, his disparate impact claim cannot survive summary judgment.

C. State-Law Tort Claims

[16] [17] [18] [19] Finally, we affirm the district court's summary judgment dismissal of Pottenger's state-law tort claims. Potlatch's statement that Pottenger "elected to take early retirement," even if false, was not defamatory. Under Idaho law, defamatory statements are actionable without allegation and proof of special damages if they impute to the plaintiff 1) a criminal offense; 2) a loathsome disease; 3) a matter incompatible with his trade, business, profession, or office; or 4) serious sexual misconduct. *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416, 425 (1996). The statement that Pottenger "elected to take early retirement" does not impute to Pottenger any of these things.3

[20] [21] Pottenger's intentional infliction of emotional distress claim also fails. In order to prove intentional infliction of emotional distress under Idaho law, Pottenger must show that Potlatch's conduct was "extreme and outrageous" and either "intentionally or recklessly" caused "severe emotional distress." *Brown v. Matthews Mortuary, Inc.*, 118 Idaho 830, 801 P.2d 37, 41 (1990); *Hatfield v. Max Rouse & Sons Northwest*, 100 Idaho 840, 606 P.2d 944, 953-54 (1980). Pottenger argues that the company's conduct was outrageous because he was fired after 32 years at the company, because he was not given an opportunity to save face, because people might infer he was discharged for misconduct or because he was "deadwood," and because the company incorrectly stated that he "elected" early retirement. The Idaho Supreme Court requires "very extreme conduct" before finding intentional infliction of emotional distress. *Brown*, 801 P.2d at 41. None of these allegations approach the sort of extreme conduct described by the Idaho court in cases where plaintiffs recovered for emotional distress from discharge. *See Holmes v. Union Oil Co.*, 114 Idaho 773, 760 P.2d 1189, 1197 (1988) (describing cases where a supervisor made abusive and racially motivated remarks when terminating an employee and where a manager fired waitresses in alphabetical order to coerce them into disclosing ***751** whether one of them was stealing from the restaurant).

AFFIRMED.

Parallel Citations

91 Fair Empl.Prac.Cas. (BNA) 1530, 61 Fed. R. Evid. Serv. 388, 03 Cal. Daily Op. Serv. 4127, 2003 Daily Journal D.A.R. 5320

Footnotes

1 Pottenger and Paulson characterize Paulson's words slightly differently, but the parties agree to the substance of the remarks.

2 The Idaho Human Rights Act incorporates the major protections of the ADEA into state law. *See* Idaho Code §§ 67-5901, 67-5909. The parties have not separately briefed the state and federal discrimination claims, and we treat them together.

3 Pottenger also alleges defamation *per quod*-a broader category of defamation that allows a plaintiff to show injury from a statement based on extrinsic evidence or innuendo. *See Gough v. Tribune-Journal Co.*, 73 Idaho 173, 249 P.2d 192, 195 (1952). In order to state such a claim, the plaintiff must allege and prove that some special harm resulted from the statement. *Yoakum*, 923 P.2d at 425. The district court concluded that Pottenger did not allege special harm. We need not decide whether this is so, because even assuming that Pottenger did allege special harm, his defamation claim still fails. Pottenger claims that a reader could infer from Potlatch's statement that he had committed some misdeed and was therefore terminated immediately. First, the announcement, dated April 19, stated that

Pottenger's retirement was effective June 1. Therefore, it is not reasonable that anyone could infer he had been immediately dismissed. Second, Pottenger offers no evidence that anyone misconstrued the announcement or that anyone would. *See Bistline v. Eberle,* 88 Idaho 473, 401 P.2d 555, 558 (1965) ("The fact that the plaintiff himself places an actionable connotation on the statements does not make such statements actionable."). There is simply no reason to believe that anyone would infer that when Potlatch wrote that Pottenger had "elected to take early retirement," the phrase connoted anything disparaging about him.

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217 F.3d 1234
United States Court of Appeals, Ninth Circuit.

William J. RAY, Plaintiff-Appellant,
v.
William J. HENDERSON, Postmaster General, Defendant-Appellee.

No. 99-15289. | Argued and Submitted April 26, 2000. | Filed July 7, 2000.

United States Postal Service employee sued government for retaliation in violation of Title VII. The United States District Court for the Eastern District of California, Garland E. Burrell, J., entered summary judgment for government. Employee appealed. The Court of Appeals, Betty B. Fletcher, Circuit Judge, held that: (1) as set forth in Equal Employment Opportunity Commission (EEOC) guidelines, "adverse employment action" required for Title VII retaliation claim is adverse treatment that is reasonably likely to deter employees from engaging in protected activity; (2) employee suffered cognizable adverse employment actions when employer, in alleged retaliation for employee's complaints concerning management's treatment of women employees, eliminated employee meetings, eliminated flexible start-time policy, instituted workplace "lockdown," and reduced employee's workload and salary; (3) as matter of first impression, hostile work environment may be basis for retaliation claim under Title VII; and (4) genuine fact issue existed as to whether employee was subjected to hostile work environment, thus precluding summary judgment on hostile work environment-based retaliation claim.

Reversed and remanded.

West Headnotes (18)

[1] Postal Service
Officers, Clerks, and Employees

Postal employee may bring suit under Title VII anti-retaliation provision pursuant to statute extending Title VII protection to federal employees. Civil Rights Act of 1964, §§ 704(a), 717, as amended, 42 U.S.C.A. §§ 2000e-3(a), 2000e-16.

2 Cases that cite this headnote

[2] Civil Rights
Practices Prohibited or Required in General; Elements

To make out prima facie case of retaliation under Title VII, employee must show that (1) he engaged in protected activity; (2) his employer subjected him to adverse employment action; and (3) a causal link exists between protected activity and adverse action. Civil Rights Act of 1964, § 704(a), as amended, 42 U.S.C.A. § 2000e-3(a).

241 Cases that cite this headnote

[3] Civil Rights
Retaliation Claims

If plaintiff has asserted prima facie retaliation claim under Title VII, burden shifts to defendant to articulate a legitimate nondiscriminatory reason for its decision. Civil Rights Act of 1964, § 704(a), as amended, 42 U.S.C.A. § 2000e-3(a).

69 Cases that cite this headnote

[4] Civil Rights
Retaliation Claims

In Title VII retaliation action, if defendant articulates legitimate nondiscriminatory reason for adverse employment decision, plaintiff bears ultimate burden of demonstrating that the reason was merely a pretext for a discriminatory motive. Civil Rights Act of 1964, § 704(a), as amended, 42 U.S.C.A. § 2000e-3(a).

92 Cases that cite this headnote

[5] **Civil Rights**
Activities Protected

Making an informal complaint to a supervisor is a protected activity under Title VII anti-retaliation provision. Civil Rights Act of 1964, § 704(a), as amended, 42 U.S.C.A. § 2000e-3(a).

16 Cases that cite this headnote

[6] **Civil Rights**
Activities Protected

Employee's complaints about the treatment of others is considered a protected activity under Title VII anti-retaliation provision, even if employee is not a member of the class that he claims suffered from discrimination, and even if discrimination he complained about was not legally cognizable. Civil Rights Act of 1964, § 704(a), as amended, 42 U.S.C.A. § 2000e-3(a).

12 Cases that cite this headnote

[7] **Civil Rights**
Adverse Actions in General

While mere ostracism by co-workers does not constitute an "adverse employment action" for purposes of Title VII anti-retaliation provision, a lateral transfer does. Civil Rights Act of 1964, § 704(a), as amended, 42 U.S.C.A. § 2000e-3(a).

35 Cases that cite this headnote

[8] **Civil Rights**
Adverse Actions in General

"Adverse employment action," as required for Title VII retaliation claim, is adverse treatment that is reasonably likely to deter employees from engaging in protected activity, and this includes such actions as lateral transfers, unfavorable job references, and changes in work schedules. Civil Rights Act of 1964, § 704(a), as amended, 42 U.S.C.A. § 2000e-3(a).

240 Cases that cite this headnote

[9] **Civil Rights**
Administrative Agencies and Proceedings

Although Equal Employment Opportunity Commission (EEOC) Guidelines are not binding on the courts, they constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.

[10] **Civil Rights**
Adverse Actions in General

Definition of adverse employment action, as required for Title VII retaliation claim, does not cover every offensive utterance by co-workers, because offensive statements by co-workers do not reasonably deter employees from engaging in protected activity. Civil Rights Act of 1964, § 704(a), as amended, 42 U.S.C.A. § 2000e-3(a).

133 Cases that cite this headnote

[11] **Postal Service**
Officers, Clerks, and Employees

Postal employee suffered cognizable "adverse employment actions," as required for Title VII retaliation claim, when employer, in alleged retaliation for employee's complaints concerning management's treatment of women employees, eliminated employee meetings and flexible start-time policy, instituted "lockdown" of workplace, and reduced employee's workload and salary disproportionately to reductions faced by other employees; actions decreased employee's pay, decreased amount of time he had to complete same amount of work, and

decreased his ability to influence workplace policy, and so were reasonably likely to deter employees from complaining about workplace discrimination. Civil Rights Act of 1964, §§ 704(a), 717, as amended, 42 U.S.C.A. §§ 2000e-3(a), 2000e-16.

34 Cases that cite this headnote

[12] **Postal Service**
Officers, Clerks, and Employees

Postal employee established causal link between his protected complaint activity under Title VII and adverse employment actions, as required for Title VII retaliation claim, by demonstrating that each action was implemented close on the heels of his complaints. Civil Rights Act of 1964, §§ 704(a), 717, as amended, 42 U.S.C.A. §§ 2000e-3(a), 2000e-16.

24 Cases that cite this headnote

[13] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Fact questions existed as to whether nondiscriminatory reasons proffered by United States Postal Service (USPS) for adverse actions taken against employee, including elimination of flexible start-time policy, institution of workplace lockdown in alleged response to death threat, and reduction in employee's pay as part of across-the-board cuts, were pretexts for retaliation following employee's complaints concerning management's treatment of women employees, thus precluding summary judgment on Title VII retaliation claim. Civil Rights Act of 1964, §§ 704(a), 717, as amended, 42 U.S.C.A. §§ 2000e-3(a), 2000e-16.

8 Cases that cite this headnote

[14] **Civil Rights**
Harassment; Work Environment

Hostile work environment may be the basis for a retaliation claim under Title VII. Civil Rights Act of 1964, § 704(a), as amended, 42 U.S.C.A. § 2000e-3(a).

11 Cases that cite this headnote

[15] **Civil Rights**
Hostile Environment; Severity, Pervasiveness, and Frequency

Harassment is actionable under Title VII only if it is sufficiently severe or pervasive to alter conditions of victim's employment and create abusive working environment, and it must be both objectively and subjectively offensive. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
22 Cases that cite this headnote

[16] **Civil Rights**
Hostile Environment; Severity, Pervasiveness, and Frequency

To determine whether an environment is sufficiently hostile to support harassment claim under Title VII, courts look to totality of the circumstances, including frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with employee's work performance. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
20 Cases that cite this headnote

[17] **Civil Rights**
Hostile Environment; Severity, Pervasiveness, and Frequency

Repeated derogatory or humiliating statements can constitute a hostile work environment under Title VII. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
9 Cases that cite this headnote

[18] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Evidence that postal service employee was, inter alia, subjected to verbal abuse by supervisors, subjected to pranks, and falsely accused of misconduct raised genuine fact issue as to whether employee was subjected to hostile work environment after he complained about treatment of women in his workplace, thus precluding summary judgment on hostile work environment-based retaliation claim under Title VII. Civil Rights Act of 1964, §§ 704(a), 717, as amended, 42 U.S.C.A. §§ 2000e-3(a), 2000e-16.

33 Cases that cite this headnote

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Appeal from the United States District Court for the Eastern District of California; Garland E. Burrell, District Judge, Presiding. D.C. No. CV-97-01776-GEB.

Before: B. FLETCHER, ALARCON, and HAWKINS, Circuit Judges.

Opinion

Betty B. FLETCHER, Circuit Judge:

In this case we are called upon to determine whether William J. Ray suffered adverse employment actions after complaining of harassment at his workplace. We hold that in our circuit an adverse employment action is adverse treatment that is reasonably likely to deter employees from engaging in protected activity. Under this standard, we conclude that Ray suffered cognizable adverse employment actions when his employer, in retaliation for Ray's complaints concerning management's treatment of women employees, eliminated employee meetings, eliminated its flexible starting time policy, instituted a "lockdown" of the workplace, and cut Ray's salary. We also hold that Ray has a cognizable claim for retaliation based on his supervisors' creation of a hostile work environment.

I

William Ray has been a rural postal carrier in Willits, California for over 28 years. In addition to Ray, there are four other rural carriers. Ray's immediate supervisor at the Willits Post Office is Dale Briggs, and the Postmaster is Dan Carey.

Prior to the events at issue in this case, the rural carriers had a flexible start-time. Ray and the other carriers generally arrived at work between 6:00 A.M. and 7:00 A.M, and they went out on their delivery routes at 9:45 A.M. Because their salaries were fixed, arriving early did not affect their incomes, however it did give them time to sort mail and do other administrative tasks before leaving on their routes.

In 1994, Ray and his co-workers became concerned about gender bias and harassment at the post office. Several female employees had apparently sought medical advice and transfers because of harassment by Briggs. The subject of the harassment of women first came up at a March 30, 1994 Employee Involvement meeting.1 At that meeting, a female janitorial employee raised her hand and asked to be recognized to speak. Postmaster Carey "immediately wheeled around, swinging his arm, yelled and pointed. He ordered [the employee] out of the meeting." After she had left, Ray spoke up. He stated his objections to the treatment of women at the post office. Postmaster Carey vehemently denied the charges, and berated Ray as a "liar."

Ray next made a complaint about the treatment of women at an April 7, 1994 Rural Carriers Employee Involvement meeting. Carey again angrily denied the charges. After these complaints failed to spur any change, Ray and two of his co-workers wrote a letter complaining of the harassment of women to Lito Sajones, Carey's supervisor.

The letter prompted a meeting, held in the nearby Ukiah Post Office on June 15, 1994, regarding the alleged harassment. At that meeting, Carey stated his displeasure that Ray had written the complaint to his supervisor. He said that, because of the letter, "I may have to change my *1238 whole approach to management. I've been a manager for eighteen years. I have left you alone. Its

called self-management. I may have to change that."

Carey did not effectuate that threat until February 1995. However, in the meantime Briggs and Carey publicly berated Ray on a regular basis. For example, Briggs yelled at Ray at a staff meeting on November 10, 1994, after Ray had made a suggestion for improving efficiency at the office. On December 24, 1994, Postmaster Carey called Ray a "rabble rouser" and a "troublemaker," and said he would cancel all future Employee Involvement meetings at the post office, apparently to avoid further complaints about gender bias and harassment. He also stated that "if Bill Ray has so much time for talking, maybe he is coming in [to the office] too early." This was another veiled threat to end the "self management" policy under which workers set their own starting and finishing times.

One week later, Ray met with Briggs and Carey to discuss employees' rights to communicate with other employees. Ray fled the meeting after Carey yelled at him and made physically threatening gestures toward him.

One month later, on January 31, 1995, Ray and the union shop steward, Bob Daitoku, met with Carey to discuss Carey's recent decision to cancel the Employee Involvement meetings. Carey stated that "We're not having any E.I. program as long as you're writing letters over my head."

Postmaster Carey made good on his threat to eliminate both the Employee Involvement program and the "self-management" policy soon after the January meeting. In February 1995, Briggs announced that all rural carriers were required to come to work at a fixed starting time: 7:00 A.M. When the fixed start time was instituted, the postal carriers found themselves with less time to sort the mail prior to going out on their routes. Ray states that he had the longest route and the largest amount of mail to sort; the 7:00 A.M. start time forced him to work at top speed, sorting 60 letters per minute and 40 magazines per minute, even though the Rural Carrier Handbook states that the standard allowable rate for sorting mail is 16 letters per minute and 8 magazines per minute. The 7:00 A.M. start time also forced Ray to work later in the afternoon so that he could finish some of the administrative tasks that he had previously done in the morning.

In May 1995, Ray's wife became extremely ill. Ray wanted to leave work earlier in order to take care of her, and he therefore requested to come to work half an hour early-at 6:30 A.M. While Briggs granted the request, he repeatedly threatened to retract the early start time.

Ray continued to be the target of Briggs and Carey's hostility during the summer and fall of 1995. On one occasion, after Ray made a suggestion at an office meeting, Briggs yelled at him, telling him to "shut up" and "that's a direct order."

Ray was twice falsely charged with misconduct. He was accused, and then cleared, of opening a package. He was later accused, and then cleared, of knocking down a mailbox on his route. Also, a series of pranks were played on Ray during this time. For example, someone left a dog biscuit near Ray's work space. On another occasion, Ray found a ball bearing in his work space.

On October 13, 1995, Ray filed a request for counseling with the EEOC, complaining of a hostile work environment. He alleged that the management at the Willits Post office employed a "singling-out-and-punish method of controlling and frightening and eventually demoralizing the workers." In his EEOC request he also stated that:

> It is because of [management's] conviction they are doing the right thing that makes the situation so troubling and actionable at law. The Joint Statement on Violence and Behavior In the Workplace clearly outlaws their practices and *1239 a continuation of their pattern will be dire. Four people have said to me the SPO should be killed. They were speaking out of frustration and pain. But this should show that the situation is not isolated to my complaint.

On November 7, 1995, Ray took stress leave from work. On November 22, while Ray was still out on stress leave, Postmaster Carey received a copy of the EEO complaint. He immediately instituted a procedure called "lockdown" at the Willits Post Office.2 During lockdown, the doors to the loading docks were kept locked at all times. Every time Ray (or another postal carrier) needed to load his vehicle with mail, he would have to unlock the doors, push his mail cart out onto the loading dock, go back inside and lock the doors, and then exit through a side door to take the mail from the cart into his car. To get back inside the post office, he would have to ring a bell and wait for another postal employee to open the door. The lockdown procedure turned a process that had taken seconds into one taking several minutes.

Postmaster Carey states that he instituted the lockdown because Ray's complaint to the EEO contained a death threat. Briggs ordered Ray not to come back to the office,

and called in a Postal Inspector to determine whether the EEO letter constituted a threat. The Inspector, Robert Dortch, conducted an investigation into the matter. He determined that no death threat had been made, and Ray was allowed to return to work. Nonetheless, even after the inspector had cleared Ray of wrongdoing, a temporary supervisor, Bill Wilber, announced to the staff that Ray had made a death threat. The lockdown at the Willits Post Office continued until February 1996, when it was discontinued without explanation.

Also in response to the supposed death threat, on December 1, 1995 Postmaster Carey canceled Ray's 6:30 start time, requiring him to arrive at work at 7:00 A.M. Carey stated that he did not want Ray coming to work early because he "had to be supervised at all times."

Ray wrote additional EEO complaint letters on December 13, 1995, January 15 and 21, 1996, and April 1, 1996. In March 1996, Ray's postal route was reduced by 90 boxes, causing him to lose approximately $3,000 from his annual salary. Although all the postal carriers suffered cuts in their routes, Ray's route was cut the most.

Ray's EEO complaint was heard by an Administrative Law Judge (ALJ) on May 28, 1997. The ALJ found that the United States Postal Service (USPS) had retaliated against Ray after he filed his written EEO counseling request, but rejected Ray's remaining claims. The USPS rejected the ALJ's finding of retaliation and entered a final agency decision rejecting all of Ray's claims on August 13, 1997.

Ray then filed suit in federal district court. His First Amended Complaint alleged retaliation for engaging in protected activity, discrimination, and failure to make accommodations for Ray to allow him to care for his ill wife. The district court granted summary judgment for the defendant on all claims. Ray appeals only the grant of summary judgment on his retaliation claim.

II

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We review the district court's decision to grant summary judgment de novo. *See Robi v. Reed,* 173 F.3d 736, 739 (9th Cir.), *cert. denied,* 528 U.S. 952, 120 S.Ct. 375, 145 L.Ed.2d 293 (1999). In reviewing an order denying or granting summary judgment, we must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the ***1240** district court correctly applied the substantive law. *See id.*

III

[1] Title VII prohibits employers from discriminating against an employee because that employee "has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). A postal employee may bring suit under § 2000e-3(a) pursuant to 42 U.S.C. § 2000e-16. *See Ayon v. Sampson,* 547 F.2d 446, 450 (9th Cir.1976).

[2] [3] [4] To make out a prima facie case of retaliation, an employee must show that (1) he engaged in a protected activity; (2) his employer subjected him to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action. *See Steiner v. Showboat Operating Co.,* 25 F.3d 1459, 1464 (9th Cir.1994). If a plaintiff has asserted a prima facie retaliation claim, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for its decision. *Id.* at 1464-1465. If the defendant articulates such a reason, the plaintiff bears the ultimate burden of demonstrating that the reason was merely a pretext for a discriminatory motive. *Id.*

[5] [6] The parties do not contest that Ray engaged in protected activities when he complained of the treatment of women at the Willits Post Office both informally and formally with the EEOC.3 The heart of this dispute is whether Ray suffered cognizable adverse employment actions. Ray asserts that he suffered from changes in workplace policy and pay, as well as from a hostile work environment. We first examine the definition of an adverse employment action. We then discuss whether the changes in workplace policy and pay constitute adverse employment actions, and whether Ray has established a causal link between his protected activities and those adverse employment actions. Finally, we examine whether Ray's allegation that he was subjected to a hostile work environment in retaliation for engaging in protected activity is cognizable under the anti-retaliation provisions of Title VII.

IV

The circuits are currently split as to what constitutes an adverse employment action. Although we have yet to

articulate a rule defining the contours of an adverse employment action, our prior cases situate us with those circuits that define adverse employment action broadly. Other circuits that define adverse employment action broadly are the First, Seventh, Tenth, Eleventh and D.C. Circuits. An intermediate position is held by the Second and Third Circuits. The most restrictive view of adverse employment actions is held by the Fifth and Eighth Circuits. Below, we set forth the Ninth Circuit's position within this split, and explain the case law in the other circuits. Then, we examine what guidelines we should follow in analyzing whether an action constitutes an adverse employment action.

[7] We have found that a wide array of disadvantageous changes in the workplace constitute adverse employment actions. ***1241** While "mere ostracism" by co-workers does not constitute an adverse employment action, *see Strother v. Southern California Permanente Medical Group,* 79 F.3d 859, 869 (9th Cir.1996), a lateral transfer does. In *Yartzoff v. Thomas,* 809 F.2d 1371, 1376 (9th Cir.1987), we held that "[t]ransfers of job duties and undeserved performance ratings, if proven, would constitute 'adverse employment decisions.' " The *Yartzoff* decision was in line with our earlier decision in *St. John v. Employment Development Dept.,* 642 F.2d 273, 274 (9th Cir.1981), where we held that a transfer to another job of the same pay and status may constitute an adverse employment action.4

Similarly, in *Hashimoto v. Dalton,* 118 F.3d 671, 676 (9th Cir.1997), we found that the dissemination of an unfavorable job reference was an adverse employment action "because it was a 'personnel action' motivated by retaliatory animus." We so found even though the defendant proved that the poor job reference did not affect the prospective employer's decision not to hire the plaintiff: "That this unlawful personnel action turned out to be inconsequential goes to the issue of damages, not liability." *Id.*

In *Strother,* we examined the case of an employee who, after complaining of discrimination, was excluded from meetings, seminars and positions that would have made her eligible for salary increases, was denied secretarial support, and was given a more burdensome work schedule. 79 F.3d at 869. We determined that she had suffered from adverse employment actions. *Id.*

These cases place the Ninth Circuit in accord with the First, Seventh, Tenth, Eleventh and D.C. Circuits. These Circuits all take an expansive view of the type of actions that can be considered adverse employment actions. *See Wyatt v. City of Boston,* 35 F.3d 13, 15-16 (1st Cir.1994) (adverse employment actions include "demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees"); *Knox v. Indiana,* 93 F.3d 1327, 1334 (7th Cir.1996) (employer can be liable for retaliation if it permits "actions like moving the person from a spacious, brightly lit office to a dingy closet, depriving the person of previously available support services ... or cutting off challenging assignments"); *Corneveaux v. CUNA Mutual Ins. Group,* 76 F.3d 1498, 1507 (10th Cir.1996) (employee demonstrated adverse employment action under the ADEA by showing that her employer "required her to go through several hoops in order to obtain her severance benefits"); *Berry v. Stevinson Chevrolet,* 74 F.3d 980, 986 (10th Cir.1996) (malicious prosecution by former employer can be adverse employment action); ***1242** *Wideman v. Wal-Mart Stores, Inc.,* 141 F.3d 1453, 1456 (11th Cir.1998) (adverse employment actions include an employer requiring plaintiff to work without lunch break, giving her a one-day suspension, soliciting other employees for negative statements about her, changing her schedule without notification, making negative comments about her, and needlessly delaying authorization for medical treatment); *Passer v. American Chemical Soc.,* 935 F.2d 322, 330-331 (D.C.Cir.1991) (employer's cancellation of a public event honoring an employee can constitute adverse employment action under the ADEA, which has an anti-retaliation provision parallel to that in Title VII).

The Second and Third circuits hold an intermediate position within the circuit split. They have held that an adverse action is something that materially affects the terms and conditions of employment. *See Robinson v. City of Pittsburgh,* 120 F.3d 1286, 1300 (3d Cir.1997) ("retaliatory conduct must be serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment ... to constitute [an] 'adverse employment action' "); *Torres v. Pisano,* 116 F.3d 625, 640 (2nd Cir.1997) (to show an adverse employment action employee must demonstrate "a materially adverse change in the terms and conditions of employment") (quoting *McKenney v. New York City Off-Track Betting Corp.,* 903 F.Supp. 619, 623 (S.D.N.Y.1995)).

The Fifth and Eighth Circuits, adopting the most restrictive test, hold that only "ultimate employment actions" such as hiring, firing, promoting and demoting constitute actionable adverse employment actions. *See Mattern v. Eastman Kodak Co.,* 104 F.3d 702, 707 (5th Cir.1997) (only "ultimate employment decisions" can be adverse employment decisions); *Ledergerber v. Stangler,* 122 F.3d 1142, 1144 (8th Cir.1997) (transfer involving only minor changes in working conditions and no reduction in pay or benefits is not an adverse employment action).

The government urges us to turn from our precedent, and to adopt the Fifth and Eighth Circuit rule that only "ultimate employment actions" such as hiring, firing, promoting and demoting constitute actionable adverse employment actions.5 But we cannot square such a rule with our prior decisions. Actions that we consider adverse employment actions, such as the lateral transfers in *Yartzoff* and *St. John,* the unfavorable reference that had no affect on a prospective employer's hiring decisions in *Hashimoto,* and the imposition of a more burdensome work schedule in *Strother* are not ultimate employment actions. Nor, for that matter, does the test adopted by the Second and Third Circuits comport with our precedent. While some actions that we consider to be adverse (such as disadvantageous transfers or changes in work schedule) do "materially affect the terms and conditions of employment," others (such as an unfavorable reference not affecting an employee's job prospects) do not.

[8] [9] The EEOC has interpreted "adverse employment action" to mean "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from ***1243** engaging in protected activity." EEOC Compliance Manual Section 8, "Retaliation," ¶ 8008 (1998). Although EEOC Guidelines are not binding on the courts, they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 65, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)); *see also Gutierrez v. Municipal Court,* 838 F.2d 1031, 1049 (9th Cir.1988). We find the EEOC test to be consistent with our prior holdings, and with the holdings in the First, Seventh, Tenth, Eleventh and D.C. Circuits.

[10] The EEOC test covers lateral transfers, unfavorable job references, and changes in work schedules. These actions are all reasonably likely to deter employees from engaging in protected activity. Nonetheless, it does not cover every offensive utterance by co-workers, because offensive statements by co-workers do not reasonably deter employees from engaging in protected activity.

As we stated in *Hashimoto,* the severity of an action's ultimate impact (such as loss of pay or status) "goes to the issue of damages, not liability." 118 F.3d at 676. Instead of focusing on the ultimate effects of each employment action, the EEOC test focuses on the deterrent effects. In so doing, it effectuates the letter and the purpose of Title VII. According to 42 U.S.C. § 2000e-3(a), it is unlawful "for an employer to discriminate" against an employee in retaliation for engaging in protected activity. This provision does not limit what type of discrimination is covered, nor does it prescribe a minimum level of severity for actionable discrimination. *See Knox* 93 F.3d at 1334 ("There is nothing in the law of retaliation that restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke her rights by filing a complaint."). We agree with the D.C. Circuit, which noted in *Passer* that:

> The statute itself proscribes "discriminat[ion]" against those who invoke the Act's protections; the statute does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion. .... "[T]o establish a prima facie case under section 704(a) [42 U.S.C. § 2000e-3(a)], a plaintiff must show: 1) that he or she engaged in activity protected by the statute; 2) that *the employer ... engaged in conduct having an adverse impact on the plaintiff;* and 3) that the adverse action was causally related to the plaintiff's exercise of protected rights."

935 F.2d at 331 (emphasis in original) (citing *Berger v. Iron Workers Reinforced Rodmen Local 201,* 843 F.2d 1395, 1423 (D.C.Cir.) (per curiam), *supplemented on other grounds on reh'g,* 852 F.2d 619 (D.C.Cir.1988)). Because the EEOC standard is consistent with our prior case law and effectuates the language and purpose of Title VII, we adopt it, and hold that an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity.6

We now turn to the question of whether the actions alleged by Ray constitute adverse employment actions under this standard, whether Ray has provided sufficient evidence of a causal link between his protected activities and the adverse employment actions, and whether he can overcome the USPS' proffered nondiscriminatory reasons for the actions.

V

[11] Ray claims that, in retaliation for his complaints, his supervisors eliminated the Employee Involvement program, eliminated the flexible start-time policy, instituted lockdown procedures, and reduced ***1244** his workload-and his pay-disproportionately to the reductions faced by other employees.7

We conclude that all four qualify as adverse employment actions. The actions decreased Ray's pay, decreased the amount of time that he had to complete the same amount of work, and decreased his ability to influence workplace policy, and thus were reasonably likely to deter Ray or other employees from complaining about discrimination

in the workplace.

[12] We also find that Ray has established a causal link between his protected activity and the employment actions by demonstrating that each action was implemented close on the heels of his complaints. That an employer's actions were caused by an employee's engagement in protected activities may be inferred from "proximity in time between the protected action and the allegedly retaliatory employment decision." *Yartzoff,* 809 F.2d at 1371.

[13] What remains, therefore, is an examination of whether Ray has produced sufficient evidence supporting his contention that the nondiscriminatory reasons proffered by the Postal Service are pretexts for retaliation. We find that he has. The USPS alleges that Carey and Briggs eliminated flexible starting times because of an increase in the amount of mail and because of later delivery of the mail to the post office. However, it is undisputed that Postmaster Carey announced publicly that he was instituting the fixed start time in response to Ray's complaints. Furthermore, the USPS' assertion is belied by the fact that even after the policy change several of the postal carriers continued to arrive at work early with official sanction.

The Postal Service also asserts that Carey instituted the lockdown procedures in response to a death threat, not for retaliatory reasons. Ray contends that this is false, and points to the fact that his supervisors continued the lockdown even after the postal inspector had stated definitively that there was no death threat. Also, supervisory employees continued to say publicly that Ray had made a threat when they knew that that was not the case. We are sensitive to the Postal Service's desire to protect its employees and customers from violence, and nothing should prevent management from taking precautionary steps. Certainly, locking the doors ensured that unauthorized persons could not enter the building, and thus enhanced security. Nonetheless, a lockdown such as that implemented by the postal service seems unlikely to prevent harm from a disgruntled employee working inside the building, nor would the lockdown stop a violent postal employee from entering the post office, since an employee would probably open the door from inside for any co-worker; indeed, if anything, the lockdown ensured that employees would find it more difficult to leave. Although the reasons for the lockdown present a close question, we conclude that Ray has raised a genuine issue of material fact, and that there is sufficient evidence to survive summary judgment on this claim.

Finally, the USPS claims that the reduction in Ray's pay was part of across-the-board cuts, and was nondiscriminatory. However, Ray has sufficiently rebutted this assertion by demonstrating that he suffered the greatest loss in pay.

We therefore hold that, viewing the evidence in the light most favorable to Ray, the district court erred in granting summary judgment on the retaliation claim.

VI

[14] We now examine whether Ray's allegation that he was subjected to a hostile work environment is cognizable under the anti-retaliation provisions of Title VII. We have not previously decided whether a hostile work environment may be the basis for a retaliation claim under Title VII. *See* ***1245** *Gregory v. Widnall,* 153 F.3d 1071, 1075 (9th Cir.1998). However, the Second, Seventh and Tenth Circuits have held that an employer may be liable for a retaliation-based hostile work environment. *See Richardson v. New York State Dep't of Correctional Serv.,* 180 F.3d 426, 446 (2nd Cir.1999) ("co-worker harassment, if sufficiently severe, may constitute adverse employment action so as to satisfy the second prong of the retaliation *prima facie* case"); *Drake v. Minnesota Mining & Mfg. Co.,* 134 F.3d 878, 886 (7th Cir.1998) ("retaliation can take the form of a hostile work environment"); *Gunnell v. Utah Valley State College,* 152 F.3d 1253, 1264 (10th Cir.1998) ("co-worker hostility or retaliatory harassment, if sufficiently severe, may constitute 'adverse employment action' for purposes of a retaliation claim").

We agree with our sister circuits. Harassment is obviously actionable when based on race and gender. Harassment as retaliation for engaging in protected activity should be no different-it is the paradigm of "adverse treatment that is based on retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." EEOC Compliance Manual ¶ 8008.
[15] [16] Harassment is actionable only if it is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). It must be both objectively and subjectively offensive. *See Faragher v. City of Boca Raton,* 524 U.S. 775, 787, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). To determine whether an environment is sufficiently hostile, we look to the totality of the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an

employee's work performance." *Id.* (*quoting Harris,* 510 U.S. at 23, 114 S.Ct. 367).

Not every insult or harassing comment will constitute a hostile work environment. In *Gregory v. Widnall,* we rejected a claim of a hostile work environment based on "[a] single drawing of a monkey on a memo circulated by senior NCO's, accompanied by the verbal explanation that it was intended to remind officers not to 'get the monkey off their back' by passing their responsibilities to others." 153 F.3d at 1074-75; *see also Strother,* 79 F.3d at 869 ("mere ostracism in the workplace is not enough to show an adverse employment decision").

[17] Repeated derogatory or humiliating statements, however, can constitute a hostile work environment. In *Hacienda Hotel,* for example, we found that the plaintiffs had demonstrated sufficiently "severe or pervasive" harassment by demonstrating that one supervisor "repeatedly engaged in vulgarities, made sexual remarks, and requested sexual favors" while another supervisor "frequently witnessed, laughed at, or herself made these types of comments." 881 F.2d at 1515. And in *Draper v. Coeur Rochester, Inc.,* 147 F.3d 1104, 1109 (9th Cir.1998), we found that the appellant's allegations that her supervisor had regularly made sexual remarks about her throughout her employment, and that he laughed at her complaints to him, raised a genuine factual issue regarding a hostile work environment.

[18] Here, after Ray made his complaint about the treatment of women at the Willits Post Office, he was targeted for verbal abuse related to those complaints for a period lasting over one and half years. His supervisors regularly yelled at him during staff meetings; they called him a "liar," a "troublemaker," and a "rabble rouser," and told him to "shut up." Additionally, Ray was subjected to a number of pranks, and was falsely accused of misconduct.

Not only did his supervisors make it harder for Ray to complete his own tasks, they made Ray an object lesson about the perils of complaining about sexual harassment in the workplace. Carey and Briggs made it clear to the other staff members ***1246** that disadvantageous changes in management style were due to Ray's complaints. Carey linked the change to a fixed starting time to Ray's letter to Carey's supervisor. He canceled the Employee Involvement meetings in response to Ray's complaints. Carey and Briggs also fostered animus in other employees whose working conditions were affected. Other employees began to distance themselves from Ray, and some stopped talking to him. In November of 1995, the difficulties at work rose to such a level that Ray took stress leave from his job.

We conclude that Ray has presented evidence that is, for purposes of summary judgment, sufficient to raise a genuine issue of fact as to whether he was subjected to a hostile work environment. We therefore hold that the district court erred in granting summary judgment on the hostile work environment-based retaliation claim.

VII

For the foregoing reasons, we REVERSE the district court grant of summary judgment and REMAND for a trial on the merits of Ray's retaliation claim.

Parallel Citations

83 Fair Empl.Prac.Cas. (BNA) 753, 78 Empl. Prac. Dec. P 40,196, 00 Cal. Daily Op. Serv. 5520, 2000 Daily Journal D.A.R. 7393

Footnotes

1 Employee Involvement meetings are a means for employees to communicate with the management regarding workplace issues.

2 It is unclear from the record whether lockdown is a standard post office procedure. Ray asserts that lockdown procedures had never been instituted in the Willits Post Office before November 1995.

3 As the statutory language quoted above indicates, filing a complaint with the EEOC is a protected activity. *See* 42 U.S.C. § 2000e-3(a). Making an informal complaint to a supervisor is also a protected activity. *See Equal Employment Opportunity Commission v. Hacienda Hotel,* 881 F.2d 1504, 1514 (9th Cir.1989).
Furthermore, an employee's complaints about the treatment of others is considered a protected activity, even if the employee is not a member of the class that he claims suffered from discrimination, and even if the discrimination he complained about was not legally cognizable. *See Moyo v. Gomez,* 40 F.3d 982 (9th Cir.1994) (prison guard had a claim for retaliation if he was discharged for complaining about the treatment of black inmates and he was acting on a reasonable belief that a Title VII violation had occurred, even though the complained-of discrimination was not actually a Title VII violation).

4 The government cites *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 and *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 912 (9th Cir.1996), for the proposition that a lateral transfer is not an adverse employment action.

In *Steiner,* this court stated in dicta and in a footnote that "the transfer is just barely-if at all-characterizable as an 'adverse' employment action: Steiner was not demoted, or put in a worse job, or given any additional responsibilities. In fact, at first she even claimed to enjoy the day shift." 25 F.3d at 1465 n. 6. The court did not reach the question of whether the transfer was an adverse employment action because it found that the action was not retaliatory in nature. *Id.* at 1465. In *Nidds,* this court, citing *Steiner,* found that the plaintiff's transfer was not an adverse employment action. 113 F.3d at 919. However, it conducted no analysis to reach this point, merely asserting that "Although we decline to view Nidds' transfer to the restoration department as an adverse employment action, his ultimate termination on July 28, 1992 certainly was." *Id.*
Neither *Steiner* nor *Nidds* establish that a lateral transfer can never be an adverse employment action. Had they done so, they would have had to abrogate this court's earlier decisions in *Yartzoff* and *St. John, supra,* neither of which were cited in the *Steiner* and *Nidds* decisions. We therefore reject the government's assertion that a lateral transfer cannot be an adverse employment action for the purposes of Title VII.

5 The government relies on *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) for the proposition that only ultimate employment actions such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities [and] a decision causing a significant change in benefits" constitute adverse employment actions. But the discussion in *Burlington Industries* cited by the government concerns the types of employment actions which, if taken by a supervisor, would subject the employer to vicarious liability for harassment. *See* 524 U.S. at 760-761, 118 S.Ct. 2257. Although the Supreme Court cited to circuit-level Title VII cases that defined "adverse employment actions," the Court specifically declined to adopt the holdings of those cases: "Without endorsing the specific results of those decisions, we think it prudent to import the concept of a tangible employment action for resolution of the vicarious liability issue we consider here." *Id.* at 761, 118 S.Ct. 2257. Therefore, we reject the contention that *Burlington Industries* set forth a standard for adverse employment actions in the anti-retaliation context.

6 The first part of the EEOC's definition of adverse employment action, which requires that the action be "based on a retaliatory motive," collapses into the "causal link" prong of the prima facie test for retaliation.

7 He also alleges that his supervisors created a hostile work environment that constituted an adverse employment action. We discuss the hostile work environment claim in the following section.

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58 F.3d 454
United States Court of Appeals, Ninth Circuit.

Jack RITTER, Plaintiff-Appellant,
v.
HUGHES AIRCRAFT CO., Defendant-Appellee.

No. 93-56711. | Argued and Submitted April 3, 1995. | Decided June 22, 1995.

Former employee sued former employer for age discrimination under the Age Discrimination in Employment ACT (ADEA), and for termination to prevent his retirement benefits from vesting in violation of the Employee Retirement Income Security Act (ERISA). The United States District Court for the Central District California, A. Andrew Hauk, J., granted summary judgment for former employer. Former employee appealed. The Court of Appeals, Leavy, Circuit Judge, held that: (1) former employee failed to establish prima facie case of age discrimination; (2) former employee failed to establish prima facie claim of termination to prevent vesting of retirement benefits in violation of ERISA; (3) former employee failed to rebut legitimate nondiscriminatory business reasons articulated by former employer for termination of former employee; and (4) district court properly took judicial notice of widespread layoffs at former employer.

Affirmed.

West Headnotes (10)

[1] Civil Rights
Age Discrimination

Standards of proof in ADEA discrimination actions parallel those in Title VII actions. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5 Cases that cite this headnote

[2] Civil Rights
Age Discrimination

Allocation of burdens of proof and order of analysis in ADEA in Title VII actions follow three step pattern: plaintiff must first establish prima facie of discrimination; then burden shifts to defendant to articulate legitimate nondiscriminatory reason for its employment decision; then, in order to prevail, plaintiff must demonstrate that employer's alleged reason for adverse employment decision was pretext for another motive which was discriminatory. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

18 Cases that cite this headnote

[3] Civil Rights
Age Discrimination

Former employee failed to establish prima facie case of age discrimination based on replacement by younger and less qualified employee; former employee's claim as to who allegedly replaced him was different in complaint and opposition to summary judgment and former employee presented no specific evidence regarding identity, age, or inferior qualifications of second alleged replacement. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

6 Cases that cite this headnote

[4] Civil Rights
Age Discrimination

Former employee failed to establish prima facie of age discrimination through circumstantial, statistical or direct evidence that discharge occurred under circumstances giving rise to inference of discrimination; fact that he worked in a number of projects and positions which were eventually subject to cutbacks and layoffs did not give rise to inference of subterfuge based on age discrimination. Age Discrimination in Employment Act of 1967, § 2 et seq., 29

U.S.C.A. § 621 et seq.

4 Cases that cite this headnote

[5] **Civil Rights**
Retaliation Claims
Labor and Employment
Presumptions and Burden of Proof

McDonnell-Douglas burden shifting analysis applicable to Title VII and ADEA claims also applies to claims for discriminatory discharge to prevent vesting of ERISA pension rights. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Employee Retirement Income Security Act of 1974, § 510, 29 U.S.C.A. § 1140.

11 Cases that cite this headnote

[6] **Labor and Employment**
Particular Cases in General
Labor and Employment
Causal Connection; Temporal Proximity

Former employee failed to establish prima facie case of discriminatory discharge to prevent vesting of retirement benefits in violation of ERISA; he failed to show how layoff policy was plan was covered by ERISA or that there was any nexus between revised layoff policy and vesting of his retirement rights. Employee Retirement Income Security Act of 1974, § 510, 29 U.S.C.A. § 1140.

1 Cases that cite this headnote

[7] **Labor and Employment**
Presumptions and Burden of Proof

Former employer articulated sufficient nondiscriminatory reasons for layoff of former employee to shift burden of going forward back to former employee to present evidence that reasons advanced by former employer were mere pretext, in action for discriminatory discharge to prevent vesting of retirement benefits in violation of ERISA, where it stated that it laid him off due to reduction in work force after carrying him in temporary positions for over a year after his discharge for cause. Employee Retirement Income Security Act of 1974, § 510, 29 U.S.C.A. § 1140.

3 Cases that cite this headnote

[8] **Evidence**
Corporations and Associations and Members Thereof

District court could take judicial notice of layoffs at employer, in action brought by former employee alleging that he was discharged because of his age and to prevent his ERISA retirement benefits from vesting, where fact of layoffs was generally known in area and was capable of sufficiently accurate and ready determination. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Employee Retirement Income Security Act of 1974, § 510, 29 U.S.C.A. § 1140; Fed.Rules Evid.Rule 201(b), 28 U.S.C.A.

30 Cases that cite this headnote

[9] **Federal Courts**
Reception of Evidence

Appellate court reviews district court's decision to take judicial notice for abuse of discretion. Fed.Rules Evid.Rule 201(b), 28 U.S.C.A.

10 Cases that cite this headnote

[10] **Labor and Employment**
Motive and Intent; Pretext

Former employer's presentation of two reasons for discharge of former employee, namely, his prior dismissal for cause and his final layoff due

to reduction in force (RIF) did not establish sufficient proof of pretext to avoid summary judgment in ERISA action for termination to prevent his retirement benefits from vesting, where rationales were not inconsistent. Employee Retirement Income Security Act of 1974, § 510, 29 U.S.C.A. § 1140.

8 Cases that cite this headnote

Attorneys and Law Firms

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Wanda R. Dorgan, Hughes Aircraft Company, Los Angeles, CA, for defendant-appellee.

Appeal from the United States District Court for the Central District of California.

Before: NOONAN, O'SCANNLAIN, and LEAVY, Circuit Judges.

Opinion

LEAVY, Circuit Judge:

Jack Ritter appeals from a grant of summary judgment in favor of Hughes Aircraft Co. Ritter claims that Hughes unlawfully discharged him: 1) because of his age, in violation of § 4 of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623,1 and 2) in order to prevent his retirement benefits from vesting, in violation of § 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140.2 We affirm.

***456 FACTS AND PRIOR PROCEEDINGS**

Jack Ritter ("Ritter") was employed by Hughes Aircraft Co. ("Hughes") from July of 1962 until August of 1979, when he voluntarily quit to pursue work as a real estate agent. Ritter was rehired as a Senior Project Engineer in the Fall of 1981, and he subsequently held a variety of positions in the company. Sometime after 1984, Ritter was appointed a Staff Manager. Six months after his last transfer, his supervisor suffered a heart attack and was replaced by a new supervisor. Ritter then began to receive negative evaluations. In 1987 he was notified that unless he could find employment elsewhere in the company he would be laid off.

Ritter was able to find employment as a Senior Project Engineer reporting to a former colleague of his. In order to obtain this position, however, Ritter was forced to accept a job declassification, but not a decrease in salary. In this new position, Ritter was given responsibility for the Automatic TOW 2 Field Test Set Program ("AT2FTS"), a new product being developed by Hughes. Ritter was also assigned to work on the Ground TOW Program ("TFTS"), devoted to supplying spare parts and equipment updates for older units in the field. George Hall ("Hall") became Ritter's immediate supervisor, and, in 1989, Richard Kagimoto ("Kagimoto") became his Operations Manager. Kagimoto was responsible for making sure that the AT2FTS and TFTS programs were on schedule and within budget.

While Ritter worked in the AT2FTS and TFTS a variety of problems developed. Ritter acknowledges that Kagimoto viewed his (Ritter's) employment performance as deficient and the source of many of the problems. Ritter also acknowledges that Hall had notified him of specific areas of upper management dissatisfaction with his work. In May of 1990, Hall informed Ritter that upper management had decided that unless he (Ritter) could find another position at the company within six weeks he would be laid off.

Ritter appealed the six week deadline to the Human Resources Manager and was allowed to remain on payroll for over one year while seeking a permanent reassignment. During this time Ritter occasionally found temporary assignments but most of his work was charged to an overhead account. In June of 1991, having been unable to find a permanent position, Ritter was laid off.

Approximately ten weeks after Ritter was laid off, Hughes revised its layoff policy. The new layoff policy provided that employees with at least 15 years of service and who were within 5 years of a retirement milestone would be offered alternate employment, in a downgrade/demotion position if necessary, prior to being laid off.

In February of 1992, Ritter brought this action against Hughes claiming that the company unlawfully terminated him because of his age and in order to prevent the vesting of his retirement benefits. In November of 1993, the district court granted summary judgment in favor of Hughes. The court held that Ritter had failed to present a *prima facie* claim under the ADEA, and that although Ritter had established a *prima facie* case of a violation of

ERISA, he did not present adequate evidence that the reasons offered by Hughes to justify his layoff were mere pretexts. Ritter now appeals from the decision of the district court.

ANALYSIS

I. Summary Judgment on the ADEA Claim

[1] [2] Standards of proof in ADEA discrimination suits parallel those in Title VII suits. "We combine the Title VII and ADEA claims for analysis because the burdens of proof and persuasion are the same." *Wallis v. J.R. Simplot, Co.,* 26 F.3d 885, 888 (9th Cir.1994). The allocation of the burdens of proof and order of analysis follow a three step pattern:

> [A] plaintiff must first establish a *prima facie* case of discrimination. If the plaintiff establishes a *prima facie* case, the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its employment decision. Then, in order to prevail, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a ***457** pretext for another motive which is discriminatory.

Id. at 889 (quoting *Rose v. Wells Fargo & Co.,* 902 F.2d 1417, 1420 (9th Cir.1990)).

[3] Ritter was 51 years old at the time of his termination, and he raised a material issue of fact as to whether he was qualified for the position of Senior Project Engineer and other positions he sought. In his Amended Complaint, Ritter alleged that after his discharge, work originally performed by him was taken by another Hughes' employee, Ernie Lau ("Lau"), "who was substantially younger ... and less qualified." But, in his opposition to summary judgment, Ritter argued not that Lau took his position, but that Lau had hired some *other* unnamed person outside the protected age group. Yet, in support of this claim, Ritter presented no specific evidence establishing the identity, age, or inferior qualifications of this employee. In view of the inconsistency of Ritter's claims and the vagueness of the evidence offered in support of them, we conclude, as did the district court, that Ritter failed to present sufficient evidence to raise any genuine material issue of fact as to whether he had been replaced by a person outside the protected class. *See Anderson v. Liberty Lobby,* 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986).

[4] Ritter, however, could also prove age discrimination "through circumstantial, statistical or direct evidence that the discharge occurred under circumstances giving rise to an inference of age discrimination." *Wallis,* 26 F.3d at 891 (quoting *Rose,* 902 F.2d at 1421). Ritter contends that because he worked in a number of projects and positions which were eventually subject to cutbacks and layoffs, there exists an inference of "subterfuge" based on age discrimination.

We find Ritter's argument meritless. In *Nesbit v. Pepsico, Inc.,* 994 F.2d 703 (9th Cir.1993), an employee claimed that his employer had violated the California Fair Employment and Housing Act by discriminating against him because of his age. The plaintiff relied on the following evidence:

> (1) statistical evidence that some older workers were terminated while some younger workers were retained and that employees hired after the RIF were generally younger than those terminated; (2) a comment by [the employee's] direct superior to [the employee] that '[w]e don't necessarily like grey hair'; and (3) an interview of [the employer's] Senior Vice President of Personnel in which he stated, "We don't want unpromotable fifty-year olds around."

Id. at 705. Observing that California courts have adopted the analysis applicable to ADEA claims, we concluded that "[v]iewing the evidence cumulatively, and in a light most favorable to the appellants, it falls short of creating an inference of age discrimination." *Id.* at 704-05. Ritter presented less evidence than that offered by the unsuccessful plaintiff in *Nesbit.* His employment history does not give rise to an inference of age discrimination.

We hold that the district did not err in concluding that Ritter failed to present a *prima facie* case of age discrimination and properly granted summary judgment.

II. Summary Judgment on the ERISA Claim

[5] We adopt the Second Circuit's view in *Dister v. Continental Group, Inc.,* 859 F.2d 1108 (2nd Cir.1988), that the burden shifting analysis applicable to Title VII and ADEA claims, described in section I above, applies also to § 510 ERISA claims:

> Because the existence of a specific intent to interfere with an employee's benefit rights is critical in § 510 cases-yet is seldom the subject of direct proof-the

> district court allocated the burdens of production and order of proof in a manner similar to the approach used in Title VII and ADEA cases, where direct evidence of discriminatory intent is also scarce or nonexistent.
>
> ... We hold that the *McDonnell Douglas* presumptions and shifting burdens of production are equally appropriate in the context of discriminatory discharge cases brought under § 510 of ERISA.

Dister, 859 F.2d at 1111-12.

[6] Section 510 of ERISA, 29 U.S.C. § 1140, prohibits an employer from terminating ***458** an employee in order to prevent the vesting of pension rights. Hughes challenged Ritter's assertion that the layoff policy was covered by ERISA. It argued that Ritter failed to establish that the layoff policy qualified as an "employee welfare benefit plan" or an "employee pension plan" covered by § 510 of ERISA. Hughes also points out that the layoff policy in question was revoked one year after it was instituted.

In *Dister,* the Second Circuit found that the termination of an employee four months prior to vesting of his pension rights, and the savings to his employer brought about by that termination, were sufficient to create an inference of discrimination. 859 F.2d at 1115. Ritter's claim, however, is much more attenuated. He argues that his ERISA rights were violated because he was prevented from taking advantage of the revised layoff policy adopted about ten weeks after he was laid off. Ritter, however, has failed to show how the layoff policy itself constitutes a plan covered by ERISA, or that there is any nexus between the revised layoff policy and the vesting of his retirement rights. If Ritter could have taken advantage of the layoff policy, which was terminated one year later, it is not evident that he would have obtained vesting of his retirement benefits. We disagree with the district court's finding that it was an undisputed fact that the revised layoff policy was covered by ERISA, and we conclude that Ritter has failed to raise a material issue of fact as to this element of his *prima facie* ERISA claim.

[7] Ritter also failed to rebut the legitimate nondiscriminatory business reasons articulated by Hughes for Ritter's layoff. Hughes said that it laid Ritter off due to a reduction in workforce after carrying him in temporary positions for over a year after his discharge for cause from the AT2FTS and TFTS programs.

Both Kagimoto and Hall state that Ritter was laid off because of a variety of problems in their programs caused by Ritter's deficient performance. Ritter himself testified that he was aware at the time that upper management was disappointed with his performance, and that Kagimoto was not familiar with the programs and believed that Ritter could not perform his duties on time and within budget.

Hughes kept Ritter on the payroll for over a year while he attempted to find other permanent work. Hughes contends that Ritter was finally laid off due to a lack of work and a company wide reduction in workforce. Hughes offered the declaration of Marie Jaqua, Human Resources Manager, who stated that she made repeated efforts to find Ritter a permanent position after his discharge from AT2FTS and TFTS. Hughes relied on portions of Ritter's own deposition testimony acknowledging work shortages. Hughes also requested judicial notice of significant layoffs occurring at Hughes. We conclude that Hughes succeeded in articulating sufficient nondiscriminatory reasons for Ritter's layoff, and the burden of going forward then shifted back to Ritter to present evidence that the reasons advanced by Hughes were mere pretexts. *Washington v. Garrett,* 10 F.3d 1421, 1432-33 (9th Cir.1993).

Ritter contends in part that he is in fact not required to present evidence rebutting the reasons offered by Hughes. He argues that Hughes never successfully articulated legitimate nondiscriminatory reasons for his discharge and layoff. We reject this contention.

[8] [9] Ritter also argues that the district court improperly took judicial notice of widespread layoffs at Hughes based on a newspaper article and that general evidence of layoffs was not sufficient to explain Ritter's individual layoff. Fed.R.Evid. 201(b) provides that judicial notice must be "one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." An appellate court reviews the district court's decision to take judicial notice under Rule 201 for an abuse of discretion. *United States v. Chapel,* 41 F.3d 1338, 1342 (9th Cir.1994), *cert. denied,* 514 U.S. 1135, 115 S.Ct. 2017, 131 L.Ed.2d 1015 (U.S.1995).

We conclude that judicial notice of layoffs at Hughes was not an abuse of discretion. ***459** This is a fact which would be generally known in Southern California and which would be capable of sufficiently accurate and ready determination. Apart from the court's taking notice of the layoffs at Hughes, Ritter in his own depositions had indicated that the general shortage of jobs at Hughes had affected his ability to find work.

[10] Finally, Ritter argues that Hughes' presentation of *two* reasons, namely, his prior dismissal for cause from his position under Kagimoto *and* his final layoff due to reduction in workforce, establishes sufficient proof of pretext to avoid summary judgment. Ritter relies on our

holding in *Washington,* that in the "ordinary case, ... fundamentally different justifications [given by the employer] for an employer's action would give rise to a genuine issue of fact with respect to pretext since they suggest the possibility that neither of the official reasons was the true reason." 10 F.3d at 1434.

Ritter's reliance on *Washington* is inappropriate. The rationales offered by Hughes are not inconsistent. The distinct timing and justifications offered by Hughes for its separate decisions to dismiss Ritter from his position under Kagimoto and his lay off one year later distinguish this case from *Washington,* where an employer simultaneously offered two distinct and arguably inconsistent reasons for an employee's discharge.

Having considered Ritter's other contentions and finding them meritless, we hold that Ritter failed to raise any issue of material fact as to essential elements of his *prima facie* ADEA and ERISA claims, and also failed to rebut the nondiscriminatory reasons offered by Hughes for his discharge and layoff.

AFFIRMED.

Parallel Citations

68 Fair Empl.Prac.Cas. (BNA) 418, 42 Fed. R. Evid. Serv. 676

Footnotes

1 Section 623 provides in relevant part:

> It shall be unlawful for an employer-
> (1) to fail or refuse to hire to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

2 Section 1140 provides in relevant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant ... for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.

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80 F.3d 1406
United States Court of Appeals, Ninth Circuit.

Herman E. SCHNIDRIG, Plaintiff-Appellant, v. COLUMBIA MACHINE, INC., a Washington corporation, Defendant-Appellee.

No. 93-35770. \| Argued and Submitted Jan. 12, 1995. \| Submission Vacated Jan. 23, 1995. \| Resubmitted April 4, 1996. \| Decided April 11, 1996.

Former employee brought action against former employer under Age Discrimination in Employment Act (ADEA) for allegedly denying him promotion because of his age and constructively discharging him. The United States District Court for the District of Oregon, Malcolm F. Marsh, J., granted summary judgment for employer, and employee appealed. The Court of Appeals, Trott, Circuit Judge, held that: (1) employee's allegations and evidence to show employer's discriminatory intent in hiring company president made summary judgment for employer inappropriate on age discrimination claim; (2) employee failed to establish that his working conditions were so intolerable and discriminatory that reasonable person would have felt forced to resign, as required for claim of wrongful constructive discharge; and (3) employer's discovery of after-acquired evidence of wrongdoing by employee did not warrant summary judgment in favor of employer.

Affirmed in part, reversed and remanded in part.

West Headnotes (7)

[1] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Any indication of discriminatory motive may suffice to raise question of fact precluding summary judgment in employment discrimination case.

73 Cases that cite this headnote

[2] **Civil Rights**
Age Discrimination

Former employee established prima facie case of age discrimination when employer denied him promotion, shifting burden to employer to articulate nondiscriminatory motives regardless of employee's qualifications.

19 Cases that cite this headnote

[3] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

If rational trier of fact could, on all evidence, find that employer's action was taken for impermissibly discriminatory reasons, summary judgment for defense on employment discrimination claim is inappropriate.

12 Cases that cite this headnote

[4] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Former employee's allegations and evidence to show employer's discriminatory intent in not hiring him as company president made summary judgment for employer inappropriate on former employee's age discrimination claim; former employee alleged that on three separate occasions, when asked to be considered for president, he was told that company's board of directors wanted somebody younger, and he produced evidence of shorthand notes taken at board meeting and affidavit of co-worker that age was considered by board in making decision.

40 Cases that cite this headnote

[5] **Civil Rights**
Constructive Discharge

Former employee failed to establish that his working conditions were so intolerable and discriminatory that reasonable person would have felt forced to resign, as required for claim of wrongful constructive discharge, though he was replaced as head of company by much younger man, forced into smaller office, and excluded from discussions with other executives, where he was not demoted, subjected to pay cut, encouraged to resign or retire, or disciplined.

28 Cases that cite this headnote

[6] **Civil Rights**
Constructive Discharge

To establish claim for "constructive discharge," former employee must show there are triable issues of fact as to whether reasonable person in his position would have felt that he was forced to quit because of intolerable and discriminatory working conditions.

30 Cases that cite this headnote

[7] **Civil Rights**
Defenses in General
Civil Rights
Relief

Employer's discovery of after-acquired evidence of wrongdoing by former employee bringing age discrimination claim did not warrant summary judgment in favor of employer, though discovery of that evidence may bear upon specific remedy to be ordered.

6 Cases that cite this headnote

Attorneys and Law Firms

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Douglas S. McDowell, Ann Elizabeth Reesman, McGuiness & Williams, Washington, ***1408** DC, for amicus curiae Equal Employment Advisory Council.

Appeal from the United States District Court for the District of Oregon, Malcolm F. Marsh, District Judge, Presiding.

Before: PREGERSON and TROTT, Circuit Judges, and FITZGERALD,*District Judge.

Opinion

OPINION

TROTT, Circuit Judge:

Herman Schnidrig appeals the district court's grant of summary judgment in favor of Columbia Machine, Inc. ("Columbia") in Schnidrig's Age Discrimination in Employment Act ("ADEA") action alleging Columbia improperly denied him a promotion because of his age and constructively discharged him. We review the district court's grant of summary judgment de novo, *Jesinger v. Nevada Fed. Credit Union,* 24 F.3d 1127, 1130 (9th Cir.1994), and reverse.

I

FACTS AND PROCEDURAL HISTORY

Columbia is a closely held Washington Corporation owned by the Neth family. Fred Neth, Sr., is the majority shareholder, chairman of the Board of Directors, and chief executive officer of Columbia. The Board consisted of six directors: Fred Neth, Sr.; three of his children, Fred Neth

Jr., Dorothy Osadchuk, and one other daughter; Bill Wells, a long time employee; and Joe Barclay, president of the Cascade Corporation.

Schnidrig, who was born in 1930, began working for Columbia as a production manager in 1980. In 1981, he was promoted to vice-president of manufacturing. In February of 1991, the president of the company, Tom Neth, resigned under pressure. Schnidrig was asked to take over the responsibilities of Tom Neth and run the company as general manager/vice-president of operations while the Board searched for a new president.

Schnidrig alleges, and we accept as true for purposes of summary judgment, that as early as June of 1991, Bill Wells told Schnidrig that during a Board of Directors meeting, Joe Barclay voiced the opinion that Columbia needed a president in the 45-50 year old range and that other directors agreed. In addition, the affidavit of Robert Showman, the manager of cost accounting, states that in the Fall of 1991, Bill Wells told him the Board was not considering Schnidrig because they wanted someone in his or her mid to late forties. Schnidrig also presented the shorthand notes of the minutes of a Board meeting held on February 25, 1992. The notes indicate during discussion regarding the preparation of materials to be sent to the executive search firm, Joe Barclay stated "they should send a copy of job description, maximum compensation level, only perk, company car, age 45-50 years, and past experience with long-term potential." Bill Wells omitted the reference to an age requirement from the final draft of the minutes.

On February 12, 1992, Schnidrig sent a memo to Fred Neth, Sr. indicating he was interested in the president's position. Schnidrig alleges that on February 19, Fred Neth, Sr. told him Joe Barclay wanted a younger man for the job and that his daughters were leaning that way as well. Schnidrig also alleges that on February 27, Fred Neth, Sr. admitted the Board discussed wanting somebody younger as the new president.

In March of 1992, the Board hired Ronald Goerss of the recruiting firm Smith, Goerss, & Ferneborg, to conduct a nationwide search for a new president and to present candidates for the position to the Board. The Board agreed the president would be selected from the candidates submitted by Goerss. The Board gave Goerss a list of six minimum qualification requirements for the position. The list included four general requirements: 1) strong work ethic; 2) warm, friendly personality; 3) effective communication skills; ***1409** and 4) team leadership. In addition, the list contained two specific requirements:

(1) a minimum of 5 years broad general management experience and proven track record with a medium sized company or a division of a larger firm engaged in the design, manufacture and sale of industrial machinery and equipment; and

(2) strong operations (manufacturing) background with a thorough working knowledge of accounting and financial reporting.

Goerss indicated he relied solely on the criteria given him by the Board and that he was never instructed to, nor did he consider age in making his decisions.

Schnidrig alleges that on May 8, he again asked Fred Neth, Sr. why he could not be president of Columbia and was again told the Board was looking for somebody younger.

In June of 1992, Goerss completed his search, including interviews of all three Columbia vice-presidents, and submitted a list of five candidates to the Board. All five candidates were from outside the company. The Board interviewed two of the five candidates and, in July, entered into negotiations with Gerald O'Meara to be the president of Columbia.

Also in July, Schnidrig again applied for the position of president and alleges he was again told the Board was looking for somebody younger in the 45-50 year old range. Thereafter, Schnidrig filed his first complaint with the EEOC. Schnidrig claims that from this point on his work environment deteriorated. Particularly, Schnidrig complains Robin Popple, another Columbia vice-president, was given a raise so that he earned more than Schnidrig; he was excluded from a lunch meeting with the officers of First Interstate Bank; company executives and other personnel were instructed not to talk to Schnidrig about various matters including corporate finances; and he was moved out of his office and given a much smaller office.

On October 8, 1992, O'Meara accepted Columbia's offer and agreed to begin work on November 2, 1992. Schnidrig resigned on October 27, 1992.

Schnidrig filed suit against Columbia claiming that he was denied the promotion to president because of his age, and that he was constructively discharged in retaliation for filing a complaint with the EEOC. The district court granted summary judgment in favor of Columbia on all claims.

II

AGE DISCRIMINATION

The allocation of burdens and order of presentation of proof for claims of discrimination arising under the ADEA follow three steps:

> [A] plaintiff must first establish a prima facie case of discrimination. If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its employment decision. Then, in order to prevail, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory.

Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir.1994) (quoting *Lowe v. City of Monrovia,* 775 F.2d 998, 1005 (9th Cir.1986)).

[1] "The prima facie case may be based either on a presumption arising from the factors such as those set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973), or by more direct evidence of discriminatory intent." *Wallis,* 26 F.3d at 889 (citing *Lowe,* 775 F.2d at 1009). Furthermore, "[w]hen a plaintiff does not rely exclusively on the presumption but seeks to establish a prima facie case through the submission of actual evidence, very little such evidence is necessary to raise a genuine issue of fact regarding an employer's motive; any indication of discriminatory motive ... may suffice to raise a question that can only be resolved by a factfinder." *Lowe,* 775 F.2d at 1009.

In this case, Schnidrig clearly established a prima facie case of age discrimination. Schnidrig did not attempt to establish the factors giving rise to a presumption of discrimination. Rather, Schnidrig offered direct evidence of discriminatory motives in the ***1410** form of statements made by directors and notes taken during Board meetings.

[2] Columbia argues that whether Schnidrig chooses to establish a prima facie case through a presumption or through direct evidence of discrimination, he must still show that he is qualified for the job. This argument is premature. Schnidrig established a prima facie case that he was treated differently on the basis of his age. Therefore, Schnidrig's qualifications are irrelevant to the existence of the prima facie case of discrimination. The burden shifts to Columbia to articulate nondiscriminatory motives regardless of Schnidrig's qualifications.

Columbia offered three nondiscriminatory reasons why it chose not to promote Schnidrig: 1) Schnidrig was eliminated as a candidate for the position by Goerss who did not include Schnidrig's name in the list of qualified candidates which he presented to the Board, therefore, it was not the Board's decision not to promote Schnidrig; 2) Schnidrig was not qualified for the job; and, 3) O'Meara was more qualified for the job than was Schnidrig.

[3] **[4]** The district court found that Columbia produced evidence to support its claim that O'Meara met the qualifications of the job profile and that Schnidrig did not. This was sufficient to shift the burden back to Schnidrig to show that Columbia's reasons for not promoting him were pretextual. Thus, the issue before this Court is whether Schnidrig produced sufficient evidence to raise a genuine issue of fact as to whether Columbia's proffered reasons were pretextual. "If a rational trier of fact could, on all the evidence, find that the employer's action was taken for impermissibly discriminatory reasons, summary judgment for the defense is inappropriate." *Wallis,* 26 F.3d at 889.

Schnidrig presented the following allegations and evidence to show discriminatory intent by Columbia: 1) Allegation that Bill Wells told Schnidrig that during a Board meeting in June of 1991, Joe Barclay expressed wanting a president in the 45-50 year old range; 2) Affidavit of Robert Showman, manager of cost accounting, stating that following a Board meeting in the fall of 1991, Bill Wells told Showman the Board was not seriously considering Schnidrig for president because they wanted someone in his or her mid to late forties; 3) Allegation that on February 19, 1992, Fred Neth, Sr. told Schnidrig some of the directors wanted a younger man as president; 4) Shorthand notes of the minutes of the Board meeting on February 25, 1992, indicating Joe Barclay that the requirement of being 45-50 years old be included in the job profile for president; 5) Allegation that on February 27, 1992, Fred Neth, Sr. admitted the Board discussed wanting somebody younger as the new president; 6) Allegation that on May 8, 1992, Fred Neth, Sr. again told Schnidrig the Board wanted somebody younger; and 7) Allegation that in July of 1992, Fred Neth, Sr. again told Schnidrig the Board was looking for somebody younger to be president.

This Court has set a high standard for the granting of summary judgment in employment discrimination cases. Most recently, we explained that " '[w]e require very little evidence to survive summary judgment' in a discrimination case, 'because the ultimate question is one that can only be resolved through a "searching inquiry"-one that is most appropriately conducted by the factfinder, upon a full record.' " *Lam v. University of Hawaii,* 40 F.3d 1551, 1563 (9th Cir.1994) (quoting *Sischo-Nownejad v. Merced Community College Dist.,* 934

F.2d 1104, 1111 (9th Cir.1991)).

> "[W]hen a plaintiff has established a prima facie inference of disparate treatment through direct or circumstantial evidence of discriminatory intent, he will *necessarily* have raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer's articulated reason for its employment decision." ... When [the] evidence, direct or circumstantial, consists of more than the *McDonnell Douglas* presumption, a factual question will almost always exist with respect to any claim of a nondiscriminatory reason. The existence of this question of material fact will ordinarily preclude the granting of summary judgment.

Sischo-Nownejad, 934 F.2d at 1111 (quoting *Lowe,* 775 F.2d at 1009). *Cf.* ***1411** *Wallis,* 26 F.3d at 890 ("[W]hen evidence to refute defendant's legitimate explanation is totally lacking, summary judgment is appropriate even though plaintiff may have established a minimal *prima facie* case based on a *McDonnell Douglas* type presumption."); *FDIC v. Henderson,* 940 F.2d 465, 473 n. 16 (9th Cir.1991) ("However, *Lowe* was subsequently amended to indicate that the Court did not mean to 'prevent the summary disposition of meritless suits but simply ensure that when a material fact exists a civil rights litigant will not be denied a trial on the merits.' ").

The district court, in granting summary judgment, emphasized that Schnidrig was eliminated as a candidate for president by Ronald Goerss of the executive search firm hired by Columbia and not by the Board. The district court found there was no evidence Goerss was ever told to consider age and that he never considered age in selecting candidates for the Board's consideration. The district court concluded the comments made by Fred Neth, Sr., were attenuated from the decision-making process, and therefore, were merely "stray remarks" with no connection to the employment decision.

The Ninth Circuit authority relied on by the district court is distinguishable. In *Merrick v. Farmers Ins. Group,* 892 F.2d 1434 (9th Cir.1990), an executive for Farmers made one comment that he chose one candidate over another because he was " 'a bright, intelligent, knowledgable young man.' " *Id.* at 1438. Similarly, in *Nesbit v. Pepsico, Inc.* 994 F.2d 703 (9th Cir.1993), a supervisor commented during a meeting that " '[w]e don't necessarily like grey hair.' " *Id.* at 705. The court found this "comment was uttered in an ambivalent manner and was not tied directly to Nesbitt's termination." *Id.*

Contrasting, in the instant case, Schnidrig alleges that on three separate occasions, when he asked to be considered for president, he was told the Board wanted somebody younger for the job. Significantly, at least one of these instances occurred after Goerss had submitted his list of candidates to the Board. Furthermore, Schnidrig did more than offer mere allegations of discriminatory intent; he produced evidence in the form of shorthand notes taken at the February 25, 1992, Board meeting and the affidavit of a coworker.

Although it is possible that Columbia sufficiently insulated the decision-making process from the discriminatory remarks of the directors, in light of the reluctance of this Circuit to allow summary judgment where there is direct or circumstantial evidence of discriminatory intent, the district court was premature in resolving this issue on summary judgment. Whether Columbia relied on impermissible factors in refusing to promote Schnidrig is a question appropriately answered by a trier of fact.

III

CONSTRUCTIVE DISCHARGE

[5] Schnidrig also contends Columbia constructively discharged him by making working conditions so intolerable that he felt forced to resign. Specifically, Schnidrig submitted six factors which, taken together, were designed to humiliate him and force him to resign: 1) He was replaced as head of the company by a man fifteen years younger than him; 2) Columbia did not give him a new position; 3) Another vice-president was given a pay raise so that he was earning more than Schnidrig; 4) He was forced to move out of his office and into a much smaller office; 5) He was excluded from a lunch meeting with officers from First Interstate Bank; and 6) Other executives were told not to speak to him about financial or other matters.

[6] To establish a claim for constructive discharge, Schnidrig "must show there are triable issues of fact as to whether 'a reasonable person in [his] position would have felt that [he] was forced to quit because of intolerable and discriminatory working conditions.' " *Steiner v. Showboat Operating Co.,* 25 F.3d 1459, 1465 (9th Cir.1994) (quoting *Thomas v. Douglas,* 877 F.2d 1428, 1434 (9th Cir.1989)).

> Whether working conditions were so intolerable and discriminatory as to justify a reasonable employee's decision to resign is normally a factual question for the jury. In general, however, a single isolated incident ***1412** is insufficient as

> a matter of law to support a finding of constructive discharge. Thus, a plaintiff alleging a constructive discharge must show some aggravating factors, such as a continuous pattern of discriminatory treatment.

Sanchez v. City of Santa Ana, 915 F.2d 424, 431 (9th Cir.1990) (internal quotations and citations omitted), *cert. denied,* 502 U.S. 815, 112 S.Ct. 66, 116 L.Ed.2d 41 (1991).

Schnidrig was not demoted, did not receive a cut in pay, was not encouraged to resign or retire, and was not disciplined. Accepting all of Schnidrig's allegations as true, his working conditions were not so intolerable and discriminatory that a reasonable person would feel forced to resign. Additionally, Columbia offered legitimate nondiscriminatory reasons for each of the actions complained of by Schnidrig.

The district court correctly found no evidence to suggest either that any of these actions were motivated to force Schnidrig to resign or that they made Schnidrig's working conditions intolerable. Therefore, the district court's grant of summary judgment for Columbia on the claim of wrongful constructive discharge is affirmed.

IV

AFTER-ACQUIRED EVIDENCE

[7] Columbia argues that even if this Court should find a genuine issue of material fact as to whether Schnidrig was denied the promotion for improper reasons, summary judgment is still appropriate because after Schnidrig resigned, Columbia discovered a legitimate nondiscriminatory reason for which Schnidrig would have been discharged. Columbia claims it later learned Schnidrig copied and removed confidential and personnel documents without authorization in violation of the terms of Columbia's employee handbook.

The Supreme Court recently held that the use of after-acquired evidence of wrongdoing by an employee that would have resulted in their termination as a bar to all relief for an employer's earlier act of discrimination is inconsistent with the purpose of the ADEA. *McKennon v. Nashville Banner Publishing Co.,* 513 U.S. 352, ----, 115 S.Ct. 879, 884, 130 L.Ed.2d 852 (1995); *see also O'Day v. McDonnell Douglas Helicopter Co.,* 79 F.3d 756, 759 (9th Cir.1996) ("[I]f an employer discharges an employee for a discriminatory reason, later-discovered evidence that the employee could have been discharged for a legitimate reason does not immunize the employer from liability."). Therefore, although Columbia's discovery of after-acquired evidence may bear upon the specific remedy to be ordered, it does not warrant the granting of summary judgment.

V

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment in favor of Columbia on Schnidrig's claim of constructive discharge is affirmed. We reverse the district court's grant of summary judgment in favor of Columbia on Schnidrig's claim of age discrimination and remand that issue to the district court for a trial on the merits.

AFFIRMED in part; REVERSED and REMANDED in part.

Each party shall bear its own costs of this appeal.

Parallel Citations

71 Fair Empl.Prac.Cas. (BNA) 1763, 68 Empl. Prac. Dec. P 44,040, 96 Cal. Daily Op. Serv. 2533, 96 Daily Journal D.A.R. 4201, 96 Daily Journal D.A.R. 4325

Footnotes

* The Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

End of Document

118 Idaho 297
Supreme Court of Idaho.

Patricia SHARP, Plaintiff–Appellant,
v.
W.H. MOORE, INC., an Idaho corporation; Anthony "Mike" Barbero, d/b/a Security Investments; and Robert Goold, d/b/a Security Police, Defendants–Respondents.

No. 16667. | July 31, 1990.

Worker who was raped while in office building brought negligence action against building owner, security contractor, and security service for failure to check that all doors in building were locked which allegedly resulted in rapist's entrance into building. The Fourth Judicial District Court, Ada County, Robert G. Newhouse, J., granted motion for summary judgment against worker, and she appealed. The Supreme Court, Bistline, J., held that: (1) genuine issues of material fact existed, precluding summary judgment for owners, contractor, and security service, on whether breach of duty to worker occurred as result of alleged failure to check that all doors were locked; (2) owners and contractor had duty of care to prevent unreasonable foreseeable risk of harm to worker; and (3) if security service employees were negligent, employees were susceptible to liability which in turn could be imputed to security contractor and building owner.

Reversed and remanded.

Bakes, C.J., filed opinion concurring in part and dissenting in part.

West Headnotes (16)

[1] **Appeal and Error**
Extent of Review Dependent on Nature of Decision Appealed from
Appeal and Error
Judgment

In reviewing order granting summary judgment, appellate court determines whether any genuine issue of material fact remains and whether moving party is entitled to judgment as matter of law by construing facts and any reasonable inferences drawn therefrom in light most favorable to nonmoving party.

1 Cases that cite this headnote

[2] **Judgment**
Tort cases in general

Genuine issue of material fact existed, precluding summary judgment for building owner, security contractor, and security service, on whether building owner, contractor, or security service's employees owed worker who was raped in building duty of care to be sure that all building doors were locked.

2 Cases that cite this headnote

[3] **Landlord and Tenant**
In general; defective or dangerous conditions
Landlord and Tenant
Questions for jury

Landlord owes duty to tenants to exercise reasonable care in light of all the circumstances and it is for jury to decide whether that duty was breached.

2 Cases that cite this headnote

[4] **Landlord and Tenant**
In general; defective or dangerous conditions

Landlord who voluntarily provides security system is potentially subject to liability if security systems fails as result of landlord's negligence.

2 Cases that cite this headnote

[5] **Detectives and Security Guards**
Authority, duty, and liability of private detectives and security providers

Negligence
Store and business proprietors

Once owner of building and security contractor initiated locked door policy and employed security service with intent of keeping doors locked, owner and contractor undertook duty and were subject to liability for failure to perform that duty with reasonable standard of care.

1 Cases that cite this headnote

[6] **Negligence**
Foreseeability
Negligence
Reasonable care

Every person has duty of care to prevent unreasonable, foreseeable risk of harm to others.

12 Cases that cite this headnote

[7] **Negligence**
Foreseeability

In determining whether duty of care is owed, if degree of result or harm is great and preventing it is not difficult, relatively low degree of foreseeability is required but, if threatened injury is minor and burdens preventing injury are high, higher degree of foreseeability may be required.

22 Cases that cite this headnote

[8] **Negligence**
Protection Against Acts of Third Persons

Proof of prior similar incidents of criminal activity occurring in building or in vicinity was not required to show that criminal activity was foreseeable absent sufficient security to keep doors in building locked.

9 Cases that cite this headnote

[9] **Negligence**
Store and business proprietors

Building owner can be held liable for negligence in keeping building area secure even if no prior similar incident of violence has occurred in building.

5 Cases that cite this headnote

[10] **Negligence**
Protection against acts of third persons

Even if building owners intended to provide security to protect only building and its contents and not persons inside, whether it was reasonably foreseeable that intruder might commit violent act after gaining entry to building where security was employed was question for jury.

[11] **Detectives and Security Guards**
Authority, duty, and liability of private detectives and security providers
Negligence
Intervening and superseding causes

Hazard to be guarded against by security contractor and security service was possibility of criminal activity within building so that any occurrence of criminal activity was not an intervening superseding force breaking the chain of causation potentially binding security contractor and building owner to liability for attack and rape of worker in building after door was left unlocked.

1 Cases that cite this headnote

[12] **Principal and Agent**
Nature of the relation in general

Agency relationship is created if one who hires another retains contractual right to control other's

manner of performance.

1 Cases that cite this headnote

[13] **Detectives and Security Guards**
Authority, duty, and liability of private detectives and security providers
Principal and Agent
Contractor

Agreement between contractor and security service created agency so that if service was negligent for not checking door through which rapist may have gained entry to building, security contractor was itself liable and its liability in turn could be imputed to building owner.

[14] **Principal and Agent**
Liabilities of agent

Agent is liable for its own negligence.

[15] **Principal and Agent**
Rights and liabilities of principal

Principal is liable for torts of agent committed within scope of agency relationship.

1 Cases that cite this headnote

[16] **Principal and Agent**
Negligence or wrongful acts of agent's employees

Both principals and agents are liable for torts of subagent committed within agency relationship.

2 Cases that cite this headnote

Attorneys and Law Firms

**507 *298 Wilson & Carnahan, Boise, for plaintiff-appellant. Robert R. Chastain, argued.

Quane, Smith, Howard & Hull, Boise, for defendants-respondents W.H. Moore, Inc. and Anthony Barbero. Robert C. Moody, argued.

Moffatt, Thomas, Barrett, Rock & Field, Boise, for defendant-respondent Robert Goold. Mark S. Prusynski, argued.

Opinion

BISTLINE, Justice.

ON REHEARING

A rehearing was granted; counsel reargued; the Court has reconsidered, and has determined to substitute this opinion for the Court in place of 1989 Opinion No. 134, which is in significant respects different, and is now withdrawn.

On May 12, 1985, Patricia Sharp was an employee of the Jess Swan Insurance Agency, whose offices were located in a building leased by Swan Insurance from W.H. Moore, Inc. W.H. Moore had contracted with Security Investment to act as property manager for the building. Security Investment, in turn, contracted with Security Police to provide the protective patrols for the building.

On the Sunday morning in question, Sharp was working alone in her office at 1199 Shoreline Drive, Boise, Idaho. While there, she was assaulted and raped by an unknown assailant who may have gained access to the building through an unlocked third floor fire escape door.

Sharp filed her complaint and demand for a jury trial on January 24, 1986. W.H. Moore, Inc. and Security Investments filed a motion for summary judgment on May 28, 1986. Security Police filed its motion for summary judgment on June 26, 1986. The district court granted both motions on the basis that, under the circumstances of this case, the defendants owed no duty of care to Sharp.

The sole issue is whether the district judge erred in this determination. Judge Newhouse discussed the matter in the following terms:

> **508 *299 It is a matter of law to determine whether a duty of care is owed in the factual circumstances pled by the plaintiff.... In this case the plaintiff has alleged the *breach of the duty of care* occurred when the defendants Moore and Barbero allowed a third floor fire escape door to have a faulty lock that could be left unlocked. The plaintiff alleges that Robert Goold and his security company *breached a duty of care in not inspecting the lock to make sure the door was locked* on the night of May 11, 1985, and the morning of May 12, 1985. It is speculated by the plaintiff and the police that the intruder gained entry into the building by going in through the third floor fire escape door. The rape and assault in this cause of action occurred in the secured area of the plaintiff's employer's offices on the second floor. The plaintiff has admitted in her deposition that she left unlocked the back door of her employer's second floor offices when she went to the bathroom. Sometime thereafter, the assault and rape occurred inside the offices. To further complicate this issue is the deposition of Lowell E. Michael, taken on May 28, 1986, in which Mr. Michael states he was the security guard on duty that night and had the job of checking the doors to make sure they were secured. Mr. Michael, in his deposition, swore under oath that he checked the third floor fire escape door and it was secured at the time of his check around midnight and 1:00 a.m. *This court is of the belief that even if the third floor door had been negligently left unlocked and had not been inspected by the security guard on the night of May 11, 1985, this court can not as a matter of law determine that the security company breached its duty of care owed to the plaintiff. The plaintiff herself could have prevented the injury if she had not negligently left the door unlocked to her offices on the second floor. This court in reviewing the totality of the circumstances does not believe that the alleged breach of the duty by the defendants is of a high enough degree of foreseeability to warrant a finding of a breach of duty that can be imposed against the defendants.* Therefore this court grants the motion for summary judgment on behalf of all the defendants in this case.

Memorandum Decision and Order, R. Vol. 1 at 29–32 (emphasis added).

[1] Review of an order granting summary judgment requires an appellate court to make two determinations: (1) Whether there remains a genuine issue as to any material fact; and (2) Whether the moving party was entitled to judgment as a matter of law. *Mitchell v. Siqueiros,* 99 Idaho 396, 582 P.2d 1074 (1978). In making those determinations, the Court will construe the facts and any reasonable inferences drawn therefrom in the light most favorable to the nonmoving party, in this case, Sharp. *Anderson v. City of Pocatello,* 112 Idaho 176, 731 P.2d 171 (1986); *Hirst v. St. Paul Fire & Marine Ins. Co.,* 106 Idaho 792, 683 P.2d 440 (Ct.App.1984).

[2] With this standard of review in mind, a reading of the trial judge's opinion, particularly the portions excerpted above, clearly demonstrates reversible error. The district court barely touched upon the only question of law before it, whether the defendants owed Sharp a duty of care. Instead the district court reached and decided factual issues that are normally reserved for the jury—defendants' *breach* of a duty, if any, and the plaintiff's *comparative negligence,* if any. The court's view that "[t]he plaintiff herself could have prevented the injury if she had not negligently left the door unlocked to her offices on the second floor," appears to have weighed particularly heavily in the court's decision. In addition, the court actually reversed the burden of persuasion, stating that "... this court cannot as a matter of law determine that the security company breached its duty of care owed to the plaintiff." Sharp did not pretend that she was entitled to summary judgment as a matter of law. It was both defendants who made that contention. It was therefore the *defendants'* burden to show that, even construing the facts and inferences most favorably to Sharp, the defendants were entitled to a **509 *300 judgment as a matter of law. This they did not do. The summary judgment in defendants' favor must therefore be reversed.

However, this reversal does not end our inquiry. "[I]n giving a decision, if a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case presented upon such appeal, and necessary to the final determination of the case." Idaho Code § 1–205. This is true even if the reversal is of a summary judgment rather than a judgment rendered after a trial. *Layrite Prods. Co. v. Lux,* 86 Idaho 477, 388 P.2d 105 (1964). It therefore remains for us to determine whether, as a matter of law,

any of the defendants owed Sharp a duty of care under the circumstances of this case.

I. THE LANDLORD

[3] The question of whether a landlord owes a duty of reasonable care to the tenants of the property was settled by our recent decision in *Stephens v. Stearns,* 106 Idaho 249, 678 P.2d 41 (1984). There, Justice Donaldson, with three judges agreeing, wrote:

> [W]e today decide to leave the common-law rule and its exceptions behind, and we adopt the rule that a landlord is under a duty to exercise reasonable care in light of all the circumstances.
>
> We stress that adoption of this rule is not tantamount to making the landlord an insurer for all injury occurring on the premises, but merely constitutes our removal of the landlord's common-law cloak of immunity.... *We hold that defendant Stearns did owe a duty to plaintiff Stephens to exercise reasonable care in light of all the circumstances, and that it is for a jury to decide whether that duty was breached.*

106 Idaho at 258, 678 P.2d at 50 (emphasis added).

[4] [5] In addition to the clear rule of *Stephens,* other legal principles favor the recognition of a requirement of due care in the circumstances present here. One is the familiar proposition that one who voluntarily assumes a duty also assumes the obligation of due care in performance of that duty. A landlord, having voluntarily provided a security system, is potentially subject to liability if the security system fails as a result of the landlord's negligence. *Jardel Co. v. Hughes,* 523 A.2d 518 (Del.1987) (having provided security, owner must anticipate conduct of third persons); *Feld v. Merriam,* 506 Pa. 383, 485 A.2d 742 (1984); *accord Rowe v. State Bank of Lombard,* 125 Ill.2d 203, 126 Ill.Dec. 519, 531 N.E.2d 1358 (1988); *Lay v. Dworman,* 732 P.2d 455 (Okla.1987) (landlord's control over security creates potential liability where tenants rely on security). While the landlord/tenant relationship does not in and of itself establish a duty to keep doors locked, once Moore and Security Investments had initiated a locked door policy and had employed a security service with the intent of keeping the doors locked, they undertook such a duty and are subject to liability if they failed to perform that duty with a reasonable standard of care.

[6] Another reason for finding a duty of care to exist in this case is the general rule that each person has a duty of care to prevent unreasonable, foreseeable risks of harm to others. *Alegria v. Payonk,* 101 Idaho 617, 619 P.2d 135 (1980); *Harper v. Hoffmann,* 95 Idaho 933, 523 P.2d 536 (1974).

> Every person has a general duty to use due or ordinary care not to injure others, to avoid injury to others by any agency set in operation by him, and to do his work, render services or use his property as to avoid such injury. [Citations omitted.] The degree of care to be exercised must be commensurate with the danger or hazard connected with the activity. [Citations omitted.]

Whitt v. Jarnagin, 91 Idaho 181, 188, 418 P.2d 278, 285 (1966). Whether the duty attaches is largely a question for the trier of fact as to the foreseeability of the risk.

[7] Foreseeability is a flexible concept which varies with the circumstances of each case. Where the degree of result or harm is great, but preventing it is not difficult, a relatively low degree of foreseeability ****510 *301** is required. Conversely, where the threatened injury is minor but the burden of preventing such injury is high, a higher degree of foreseeability may be required. *See U.S. v. Carroll Towing Co.,* 159 F.2d 169, 173 (2d Cir.1947) (Judge Learned Hand); *Isaacs v. Huntington Memorial Hosp.,* 38 Cal.3d 112, 211 Cal.Rptr. 356, 695 P.2d 653, 658 (1985). Thus, foreseeability is not to be measured by just what is more probable than not, but also includes whatever result is likely enough in the setting of modern life that a reasonably prudent person would take such into account in guiding reasonable conduct. *Bigbee v. Pacific Tel. & Tel. Co.,* 34 Cal.3d 49, 192 Cal.Rptr. 857, 665 P.2d 947 (1983); *Mullins v. Pine Manor College,* 389 Mass. 47, 449 N.E.2d 331 (1983).

Defendants argue that they are entitled to summary judgment on the issue of foreseeability because the plaintiff failed to come forward with any evidence that prior similar incidents of criminal activity had occurred in the building or in its vicinity. However, the "prior similar incidents" rule was rejected recently by a leading case upon which the trial court purported to rely to the contrary. In *Isaacs v. Huntington Memorial Hosp.,* 38 Cal.3d 112, 211 Cal.Rptr. 356, 695 P.2d 653 (1985), the California high court rejected a strong line of cases from California's intermediate appellate courts that held to the position espoused here by the defendants. The California court ruled that while prior similar incidents are relevant evidence of foreseeability, they are not the *sine qua non* on the issue of foreseeability. *Id.* at 362, 211 Cal.Rptr. at 659. *See also Sharpe v. Peter Pan Bus Lines,* 401 Mass. 788, 519 N.E.2d 1341 (1988); *Mullins v. Pine Manor College,* 389 Mass. 47, 449 N.E.2d 331 (1983);.

The solid and growing national trend has been toward the rejection of the "prior similar incidents" rule. *See, e.g., Rowe v. State Bank of Lombard,* 125 Ill.2d 203, 126 Ill.Dec. 519, 531 N.E.2d 1358 (1988) (simply because no violent crimes had been committed at the office parking area does not render criminal actions unforeseeable as a matter of law); *Samson v. Saginaw Professional Bldg. Inc.,* 393 Mich. 393, 224 N.W.2d 843 (1975); *Aaron v. Havens,* 758 S.W.2d 446 (Mo.1988) (no need for past similar crimes); *Small v. McKennan Hosp. (Small II),* 437 N.W.2d 194 (S.D.1989) (failure to prove any criminal activity in the area is not fatal to the submission of the foreseeability issue to the jury because criminal assaults occur in all neighborhoods); *Paterson v. Deeb,* 472 So.2d 1210, 1218–19 (Fla.App.1985) ("[w]e are not willing to give the landlord one free ride, as it were, and sacrifice the first victim's right to safety upon the altar of foreseeability by slavishly adhering to the now-discredited notion that at least one criminal assault must have occurred on the premises before the landlord can be held liable").

[8] [9] Reduced to its essence, the "prior similar incidents" requirement translates into the familiar but fallacious saying in negligence law that every dog gets one free bite before its owner can be held to be negligent for failing to control the dog. That license which is refused to a dog's owner should be withheld from a building's owner and the owner's agents as well. There is no "one free rape" rule in Idaho.

The "prior similar incidents" requirement is not only too demanding, it violates the cardinal negligence law principle that only the general risk of harm need be foreseen, not the specific mechanism of injury. *Taco Bell v. Lannon,* 744 P.2d 43 (Colo.1987); *Galloway v. Bankers Trust Co.,* 420 N.W.2d 437 (Iowa 1988); *Duncavage v. Allen,* 147 Ill.App.3d 88, 100 Ill.Dec. 455, 497 N.E.2d 433 (1986); Prosser & Keeton, The Law of Torts § 43 at 299 (5th ed. 1984). *See also Knodle v. Waikiki Gateway Hotel, Inc.,* 69 Haw. 376, 742 P.2d 377 (1987); *Small v. McKennan Hosp. (Small I),* 403 N.W.2d 410 (S.D.1987). Such a requirement would remove far too many issues from the jury's consideration. Foreseeability is ordinarily a question of fact. *Isaacs v. Huntington Memorial Hosp.,* 38 Cal.3d 112, 126, 211 Cal.Rptr. 356, 362, 695 P.2d 653, 659 (1985).

[10] Defendants argue that security was provided to protect only the building and its contents, not the persons within. ****511 *302** Otherwise put, property is entitled to protection, but not so with persons. In reality the question is whether it is foreseeable that an intruder might commit a violent act after gaining entry to the building where security was employed to protect against "prowlers, vandals or unauthorized intruders." Service Agreement between Security Police and Security Investments, R. Vol. 1 at 26. The risk to be prevented was that of criminal activity. Unfortunately criminals do not tidily confine their crimes to property only. Even a shoplifting may turn violent. *Jardel Co. v. Hughes,* 523 A.2d 518, 525 (Del.1987); *Galloway v. Bankers Trust Co.,* 420 N.W.2d 437, 439 (Iowa 1988). *Accord Aaron v. Havens,* 758 S.W.2d 446, 448 (Mo.1988) ("[i]f a burglar may enter so may a rapist"); *Small v. McKennan Hospital (Small II),* 437 N.W.2d 194 (S.D.1989). The question is one of foreseeability. It is therefore an issue for the jury or other trier of fact to decide. *K.S.R. v. Novak & Sons, Inc.,* 225 Neb. 498, 406 N.W.2d 636 (1987); *Isaacs,* 211 Cal.Rptr. at 362, 695 P.2d at 659.

[11] Defendants also argue that the occurrence of criminal activity is an intervening, superseding force that breaks the chain of causation potentially binding defendants to liability. While this is a superficially pleasing statement of a general rule, it has no applicability under the circumstances of this case. Here the precise hazard to be guarded against was criminal activity.

> If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.
>
> b. The happening of the very event the likelihood of which makes the actor's conduct negligent and so subjects the actor to liability cannot relieve him from liability. The duty to refrain from the act committed or to do the act omitted is imposed to protect the other from this very danger. To deny recovery because the other's exposure to the very risk from which it was the purpose of the duty to protect him resulted in harm to him, would be to deprive the other of all protection and to make the duty a nullity.

Restatement (Second) of Torts § 449 and comment b (1965). *Accord Holley v. Mt. Zion Terrace Apartments, Inc.,* 382 So.2d 98, 101 (Fla.App.1980) (rejecting the "superseding" argument as entirely fallacious). *See also Massie v. Godfather's Pizza, Inc.,* 844 F.2d 1414 (10th Cir.1988); *Meyers v. Ramada Hotel Operating Co.,* 833 F.2d 1521 (11th Cir.1987); *Duncavage v. Allen,* 147 Ill.App.3d 88, 100 Ill.Dec. 455, 459–60, 497 N.E.2d 433, 437–38 (1986).

Thus, in addition to the rule of *Stephens v. Stearns,* 106 Idaho at 249, 678 P.2d at 41, imposing a duty of reasonable care, under the circumstances, running from landlords or owners to their tenants as a matter of law, there are ample

additional reasons for imposing such a duty on the landlord in this case. It remains for a jury to determine whether there was any breach of that duty. Therefore the summary judgment as to Moore is reversed and remanded.

II. THE LANDLORD'S AGENTS

Remaining for our consideration are the summary judgment rulings in favor of defendants Security Investments and Security Police. Two contracts in the record demonstrate the establishment of a principal/agency relationship between Moore and Security Investments and a subagency relationship between Security Investments and Security Police.

[12] Security Investments was hired by Moore to manage the building housing Sharp's employer. The contract between them provided in relevant part:

> Contractor [Security Investments] shall [make] appropriate arrangements for and [supervise] the delivery of utility, *security,* ... and other services incidental to the operation of the Project, all in a manner consistent with the efficient operation of a first class office development *and in accordance with such specific* ****512** ***303** *guidelines as may from time to time be given by Owner.*

R. Vol. 2, at 12 (emphasis added). It is axiomatic that an agency relationship is created where one who hires another has retained a contractual right to control the other's manner of performance. *Bryant v. Sherm's Thunderbird Market,* 268 Or. 591, 522 P.2d 1383 (1974); *Smith v. Henger,* 148 Tex. 456, 226 S.W.2d 425 (1950).

[13] The contract between the building manager and Security Police provided the following explicit agency-creating language:

> Security Police is hereby given authority and made agent to act in behalf of and to do all acts that Subscriber could do to protect the above premises from PROWLERS, VANDALS, OR UNAUTHORIZED INTRUDERS.

R. Vol. 1 at 26.

[14] [15] [16] As a result of the agency relationships established, if Security Police was negligent for not checking the door through which the rapist may have gained entry, Security Police itself is susceptible to liability, which in turn may be imputed to Security Investments and to Moore. An agent is liable for its own negligence. *McAlvain v. General Ins. Corp. of America,* 97 Idaho 777, 781, 554 P.2d 955, 959 (1976); Restatement (Second) of Agency § 343 (1958). A principal is liable for the torts of an agent committed within the scope of the agency relationship. *Bailey v. Ness,* 109 Idaho 495, 497, 708 P.2d 900, 902 (1985); Restatement (Second) of Agency § 251 (1958). Both principals and agents are liable for the torts of a subagent committed within the agency relationship. Restatement (Second) of Agency §§ 255, 362 (1958). Thus the negligence, if any, of the subagent, Security Police, renders it potentially liable to Sharp, and its liability may be imputed to the agent, Security Investments, and to the principal, Moore.

All three summary judgments are reversed and the cause is remanded for further proceedings. Costs to appellant; no attorney fees on appeal.

JOHNSON and BOYLE, JJ., and WALTERS, J. Pro Tem., concur.

BAKES, Chief Justice, concurring in part and dissenting in part:

I concur in the reversal of summary judgment for W.H. Moore, Inc. However, I dissent from the reversal of summary judgment for the defendants Security Investments and Security Police. Under I.R.C.P. 56(c) summary judgment should be affirmed when "the pleadings, depositions and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The plaintiff has not shown any breach of duty owed to the plaintiff by either Security Investments or Security Police and, accordingly, the summary judgment in favor of these two defendants should be affirmed.

Since the analysis of the right to summary judgment differs among the various defendants, a separate analysis of the claims against each of the defendants is necessary.

I. CLAIM AGAINST W.H. MOORE, INC.

As owner and landlord of Forest River Plaza # 1 building (the plaza), W.H. Moore, Inc. (Moore), owed certain duties to its tenants including the Jess Swan Insurance Agency

(Swan) and to its tenants' employees, including plaintiff Sharp. Owner/landlord Moore owed a duty to tenant Swan "to exercise reasonable care in light of all the circumstances." *Stephens v. Stearns,* 106 Idaho 249, 258, 678 P.2d 41, 50 (1984). Under our decision in *Keller v. Holiday Inns, Inc.,* 107 Idaho 593, 595, 691 P.2d 1208, 1210 (1984), an owner/landlord must also "exercise reasonable care in light of all the circumstances" to a *tenants' employees* (1) "for protection [from a dangerous condition] even though the dangerous condition is known and obvious to the employee," and under *Marcher v. Butler,* 113 Idaho 867, 871, 749 P.2d 486, 490 (1988), (2) "to provide safe conditions for employment upon the premises."

**513 *304 Reviewing the entire record most favorably to the party opposing the summary judgment motion, the record reflects that there was a genuine issue of material fact regarding (1) whether the defendant Moore breached a duty to Sharp; (2) whether that breach was the actual cause of Sharp's injury; and (3) was that breach the proximate cause of Sharp's injury. Accordingly, I agree that the summary judgment for Moore should be reversed.

II. CLAIMS AGAINST SECURITY INVESTMENTS AND SECURITY POLICE

Sharp also alleges that the defendants Security Investments and Security Police breached duties owed to her. Depending on the relationship of the parties, there can be duties owed in tort and/or in contract. *See Just's v. Arrington Construction Co., Inc.,* 99 Idaho 462, 468, 583 P.2d 997, 1003 (1978) ("[N]egligent conduct and breach of contract are two distinct theories of recovery."). Unfortunately, the Court's opinion today fails to distinguish between those "two distinct theories of recovery." The Court's opinion recognizes the contractual relationship between Moore and Security Investments (the property manager) and between Security Investments and Security Police (who provided the periodic daily inspections). However, the Court makes no analysis of how Security Investments and Security Police breached any tort duties owed to Sharp or, for that matter, contractual duties to the plaintiff Sharp. While indeed Security Investments may have breached its contractual duties to Moore, and Security Police may have breached its contractual duties to Security Investments, neither Security Investments nor Security Police breached either a contractual or a tort duty to the plaintiff Sharp, and accordingly summary judgment was appropriate in favor of those two defendants.

A. Tort Duties

"A tort requires the wrongful invasion of an interest protected by the law...." *Just's v. Arrington Construction Co., Inc.,* 99 Idaho 462, 468, 583 P.2d 997, 1003 (1978).

> The elements of common law negligence have been summarized as (1) a duty, recognized by law, requiring a defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injuries; and (4) actual loss or damage.

Alegria v. Payonk, 101 Idaho 617, 619 P.2d 135 (1980).

The law recognizes that owner/landlords owe duties to their tenants and their tenants' employees to exercise reasonable care (1) "in light of all the circumstances," *Stephens v. Stearns,* 106 Idaho 249, 258, 678 P.2d 41, 50 (1984), (2) "for protection [from a dangerous condition] even though the dangerous condition is known and obvious to the employee," *Keller v. Holiday Inns, Inc.,* 107 Idaho 593, 595, 691 P.2d 1208, 1210 (1984), and (3) "to provide safe conditions for employment upon the premises." *Marcher v. Butler,* 113 Idaho 867, 871, 749 P.2d 486, 490 (1988). These duties of the owner/landlord are based on the landlord/tenant relationship with the tenant and the tenant's employees. Because an owner/landlord exercises control of his building, he also bears responsibility for foreseeable injuries to the tenants and their employees resulting from his failure to exercise reasonable care. *Id.* However, Security Investments and Security Police were not the owner/landlord, nor did they have any recognized legal relationship with the tenants of the owner/landlord or the tenants' employees such as plaintiff Sharp. They do not become the owner/landlord merely by contracting to perform services, even security services, for the landlord. While their contracts may have imposed some contractual duties upon them, there can be no recovery in tort by Sharp from Security Investments or Security Police because they owed no duty to Sharp. Strangely, the majority opinion does not make a tort analysis with regard to Security Investments and Security Police. The majority opinion does not point out any duty owed by Security Investments or Security Police to Sharp the breach of which could result in a negligence claim by Sharp against them. The Court's opinion merely **514 *305 states that, "If Security Police was negligent for not checking the door through which the rapist may have gained entry, Security Police itself is susceptible to liability, which in turn may be imputed to Security Investments and to Moore. An agent is liable for its own negligence." *Ante* at 303, 796 P.2d at 512. However, the Court does not go on and determine whether

or not Security Police breached any duty to Sharp, which could be the basis for its negligence. Rather, the Court concludes that, "Thus the negligence, *if any,* of the sub-agent, Security Police, renders it potentially liable to Sharp, and its liability may be imputed to the agent, Security Investments, and to the principal, Moore." *Ante* at 303, 796 P.2d at 512 (emphasis added). All the Court has said is that *if* there was any negligence on the part of Security Police, it could be imputed to Security Investments and Moore. The Court may be correct in concluding that if there was negligence on the part of Security Police it would be imputed to Security Investments and to Moore. That would depend on whether Security Police was an agent rather than an independent contractor. However, the Court has not made any analysis establishing that there was a triable issue of fact concerning whether Security Police had breached a duty toward Sharp which could result in a claim of negligence by Sharp against Security Police. The Court has merely said that if there was any negligence on the part of Security Police it would be imputed to the others. The Court has not demonstrated how this record establishes any negligence on the part of either Security Investments or Security Police, *i.e.,* breach of a duty owed by either to Sharp. To the contrary, the record demonstrates that no such tort duty was owed, and accordingly the summary judgment granted in favor of those two defendants should be affirmed.

B. Contract Duties

Because Sharp was not in privity of contract with either Security Investments or Security Police, the only possible contractual duty owed to her by these two defendants would be under a third party beneficiary theory. Here, Sharp alleges, and the majority opinion by reversing apparently assumes, that the contracts between (1) Moore and Security Investments, and (2) Security Investments and Security Police were intended to benefit her as an employee of Moore's tenant, Swan. However, a review of our prior cases clearly demonstrates that plaintiff Sharp was not a third party beneficiary of those contracts between (1) Moore and Security Investments, and (2) Security Investments and Security Police.

We have previously set forth requirements for recovery under third party beneficiary theory:

> [B]efore recovery can be had by a third party beneficiary, it must be shown that the contract was made for his direct benefit, or as sometimes stated primarily for his benefit, and that it is not sufficient that he be a mere incidental beneficiary.
>
> ....
>
> ... [T]he contract itself must express an intent to benefit the third party. 'This intent must be gleaned from the contract itself unless that document is ambiguous, whereupon the circumstances surrounding its formation may be considered.' [*Stewart v. Arrington Construction Co.,* 92 Idaho 526, 532, 446 P.2d 895, 901 (1968)].
> *Adkison Corp. v. American Building Co.,* 107 Idaho 406, 409, 690 P.2d 341, 344 (1984). A third party may only enforce a contract "if he can show he is a member of a limited class for whose benefit it was made." *Stewart v. Arrington Construction Co.,* 92 Idaho at 532, 446 P.2d at 901; *Just's, Inc. v. Arrington Construction Co.,* 99 Idaho 462, 464, 583 P.2d 997, 999 (1978).

Here, in order for Sharp to recover from Security Investments under a third party beneficiary theory, the contract between Security Investments and Moore must express an intent to benefit her as a third party. However, the contract does not express such an intent. In its "Management Agreement" with Moore, Security Investments agreed to manage the *plaza* and to "provide for the smooth and efficient physical operation of the [*plaza*] by making ****515 *306** appropriate arrangements for and supervising the delivery of utilities, security, emergency response, inspection and other services incidental to the operation of the [*plaza*]...." In the contract, Security Investments undertook no duty with reference to the safety of the tenants' employees. It only agreed "to promote a harmonious relationship with Tenants on behalf of Owner, and in furtherance thereof shall visit all tenants at their premises on a regular basis to express the owner's appreciation of their tenancy and to solicit their suggestions and comments and shall provide prompt and courteous response to tenant inquiries and problems." Such a provision is insufficient to demonstrate that the parties intended that employees of a tenant would be able to exercise rights under the contract. At most the tenants' employees were only *incidental* beneficiaries of Security Investments' contractual duty to manage the *plaza.* Under our prior cases such an incidental beneficiary may *not* maintain a third party beneficiary action. *Just's, Inc. v. Arrington Construction Co.,* 99 Idaho 462, 583 P.2d 997 (1978); *Stewart v. Arrington Construction Co.,* 92 Idaho 526, 446 P.2d 895 (1968).

It follows that if Security Investments' contract with W.H. Moore did not undertake an express contractual duty to intentionally benefit Sharp, then it could not further pass on such a duty in its contract with Security Police. Even if it could, Security Investments in fact did not contract expressly with Security Police to provide safe conditions for employees working in the plaza. Rather, in its "Service Agreement" with Security Investments, Security Police

merely agreed to (1) "furnish night patrol services to [the plaza] intermittently during the hours of 8:00 o'clock PM and 7:00 o'clock AM seven nights per week ... doors to be locked at 7–8:00 o'clock PM and unlocked at 7:00 o'clock AM on weekdays only"; (2) "check the above named premises for Forcible Entry, Unauthorized Persons, Unlocked Doors, Broken Windows, Fire ..."; (3) "[c]heck three front doors and fire escape on third floor, East end at opening, regular rounds and closing"; and (4) "protect the above premises from Prowlers, Vandals or Unauthorized Intruders." The contract makes no mention of providing personal security for either tenants or tenants' employees. Again, while tenants' employees may have derived some *incidental* benefits from the Security Investments–Security Police contract, the contract itself was not expressly intended to benefit them, and there is no indication that the contracting parties intended that third parties, such as Sharp, would be entitled to exercise rights under the contract as third party beneficiaries. The only arguable third party beneficiary from the Security Investments–Security Police contract was Moore, the plaza's owner.

Even if the contracts of the defendants Security Investments and Security Police had been worded so as to express an intention that tenants or their employees were to be third party beneficiaries who could exercise rights under those contracts, violation of such a third party beneficiary provision would not have been a tort, but would merely have provided Sharp with contract damages. *Taylor v. Herbold,* 94 Idaho 133, 138, 483 P.2d 664, 669 (1971) ("Ordinarily, a breach of contract is not a tort."). Sharp's claim against Security Investments and Security Police alleged a tort, not a breach of contract. Therefore, even if those two contracts had clearly provided that the tenants and their employees were intended to be direct third party beneficiaries, not merely incidental beneficiaries, *Stewart v. Arrington Construction Co.,* 92 Idaho 526, 446 P.2d 895 (1968), the mere breach of the contract would not constitute a tort. "To found an action in tort, there must be a breach of duty apart from the non-performance of a contract." *Taylor v. Herbold,* 94 Idaho at 138, 483 P.2d at 669.

Accordingly, because Security Investments and Security Police did not owe any contractual duty to Sharp, the summary judgment entered in favor of Security Investments and Security Police should be affirmed.

Parallel Citations

796 P.2d 506

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140 Idaho 354
Supreme Court of Idaho,
Boise, December 2003 Term.

J. Scott SHAWVER, a/k/a Scott Shawver and Mary L. Shawver, a/k/a Mary Shawver, Plaintiffs–Respondents–Cross Appellants,
v.
HUCKLEBERRY ESTATES, L.L.C., an Idaho limited partnership, Defendant–Appellant–Cross Respondent.

No. 28855. | April 29, 2004. | Rehearing Denied June 22, 2004.

Synopsis

Background: Prospective purchasers of subdivision lot brought action against vendor, seeking both specific performance of sale agreement and declaration that amendments to restrictive covenants were void. Following a bench trial, the District Court, Fourth Judicial District, Ada County, Kathryn A. Sticklen, J., concluded that prospective purchasers were entitled to specific performance, but did not offset award of attorney fees and costs against amount prospective purchasers owed in order to close on purchase. Prospective purchasers and vendor appealed.

Holdings: The Supreme Court, Schroeder, J., held that:
[1] vendor's action of recording invalid amendment to original recorded restrictive covenants did not violate terms of sale agreement;
[2] vendor's action of recording invalid amendment did not violate implied covenant of good faith and fair dealing;
[3] purchase was subject to amended restrictive covenants; and
[4] vendor was entitled as prevailing party to award of appellate attorney fees and costs.

Reversed.

Kidwell, J., dissented.

West Headnotes (35)

[1] Appeal and Error
⇦Extent of Review Dependent on Nature of Decision Appealed from

On appeal from the grant of a motion for summary judgment, Supreme Court employs the same standard as used by the district judge originally ruling on the motion. Rules Civ.Proc., Rule 56(c).

7 Cases that cite this headnote

[2] Judgment
⇦Motion or Other Application

Fact that both parties move for summary judgment does not in and of itself establish that there is no genuine issue of material fact. Rules Civ.Proc., Rule 56(c).

4 Cases that cite this headnote

[3] Judgment
⇦Existence or Non-Existence of Fact Issue
Judgment
⇦Hearing and Determination

When an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant summary judgment despite the possibility of conflicting inferences. Rules Civ.Proc., Rule 56(c).

8 Cases that cite this headnote

[4] Appeal and Error
⇦Inferences from Facts Proved

When reviewing trial court's decision on motion for summary judgment in action to be tried to the court, the test for reviewing the inferences drawn by the trial court based on undisputed evidence is whether the record reasonably supports the inferences. Rules Civ.Proc., Rule 56(c).

8 Cases that cite this headnote

[5] **Vendor and Purchaser**
Covenants

Vendor's action of recording invalid amendment to original recorded restricted covenants did not violate terms of sale agreement concerning subdivision lot; by terms of sale agreement, purchasers agreed to purchase lot governed by restrictive covenants, which could be amended by written consent of existing lot owners, and purchasers had no right under sale agreement to override amendment provision or to avoid compliance in event amendments were properly adopted.

1 Cases that cite this headnote

[6] **Contracts**
Ambiguity in General

When the language of a contract is clear and unambiguous, its interpretation and legal effect are questions of law.

3 Cases that cite this headnote

[7] **Contracts**
Language of Instrument

Unambiguous contract will be given its plain meaning.

1 Cases that cite this headnote

[8] **Contracts**
Intention of Parties

Purpose of interpreting a contract is to determine the intent of the contracting parties at the time the contract was entered.

2 Cases that cite this headnote

[9] **Contracts**
Construing Whole Contract Together

In determining the intent of the parties, Supreme Court must view the contract as a whole.

1 Cases that cite this headnote

[10] **Contracts**
Ambiguity in General

If a contract is found ambiguous, its interpretation is a question of fact.

2 Cases that cite this headnote

[11] **Contracts**
Ambiguity in General

Whether a contract is ambiguous is a question of law.

[12] **Appeal and Error**
Cases Triable in Appellate Court

Whether facts establish violation of contract is a question of law reviewed de novo.

[13] **Contracts**
Breach by Failure of Performance

Breach of contract occurs when there is a failure to perform a contractual duty.

1 Cases that cite this headnote

[14] **Contracts**
Rewriting, Remaking, or Revising Contract

Courts do not possess the roving power to rewrite contracts in order to make them more equitable.

5 Cases that cite this headnote

[15] **Vendor and Purchaser**
Covenants

Vendor's action of recording invalid amendment to original recorded restricted covenants concerning subdivision lot did not violate implied covenant of good faith and fair dealing regarding sale agreement; amendment was simply void due to failure to comply with amendment process, and purchasers were not deprived of any benefit under contract with vendor.

1 Cases that cite this headnote

[16] **Contracts**
Terms Implied as Part of Contract

No covenant will be implied which is contrary to the terms of the contract negotiated and executed by the parties.

[17] **Contracts**
Terms Implied as Part of Contract
Contracts
Acts or Omissions Constituting Breach in General

Implied covenant of good faith and fair dealing requires that the parties perform, in good faith, the obligations imposed by their agreement, and a violation of the covenant occurs only when either party violates, nullifies, or significantly impairs any benefit of the contract.

2 Cases that cite this headnote

[18] **Appeal and Error**
Findings of Fact and Conclusions of Law

Supreme Court exercises free review over the district court's conclusions of law.

2 Cases that cite this headnote

[19] **Appeal and Error**
Clearly Erroneous Findings

In determining whether a finding by the district court is clearly erroneous, Supreme Court does not weigh the evidence as the district court did. Rules Civ.Proc., Rule 52(a).

[20] **Appeal and Error**
Clearly Erroneous Findings

When reviewing whether trial court's findings of fact are clearly erroneous, Supreme Court inquires whether findings are supported by substantial and competent evidence. Rules Civ.Proc., Rule 52(a).

[21] **Appeal and Error**
Substituting Reviewing Court's Judgment

When reviewing district judge's findings of fact, Supreme Court will not substitute its view of the facts for the view of the district judge. Rules Civ.Proc., Rule 52(a).

[22] **Appeal and Error**
Substantial Evidence

In reviewing whether trial court's findings of fact are supported by substantial evidence, evidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact had been proven. Rules Civ.Proc., Rule 52(a).

[23] **Covenants**
Agreement of Parties

Purchase of subdivision lot was subject to amended restrictive covenants that increased minimum square footage of houses to be constructed on lots and that were recorded after sale agreement had been executed; original recorded covenants, which were in effect at time of execution of sale agreement, contained unambiguous provision allowing amendments if adopted upon written consent of specified percentage of owners.

1 Cases that cite this headnote

[24] **Covenants**
Nature and Operation in General

Idaho recognizes the validity of covenants that restrict the use of private property.

1 Cases that cite this headnote

[25] **Covenants**
Nature and Operation in General

When interpreting covenants that restrict the use of private property, Supreme Court generally applies the same rules of construction as are applied to any contract or covenant; however, because restrictive covenants are in derogation of the common law right to use land for all lawful purposes, Supreme Court will not extend by implication any restriction not clearly expressed.

[26] **Covenants**
Nature and Operation in General

When interpreting covenant restricting use of private property, all covenants are to be resolved in favor of the free use of land.

1 Cases that cite this headnote

[27] **Covenants**
General Rules of Construction

Beginning with the plain language of the covenant, the first step in interpreting covenant is to determine whether or not there is an ambiguity.

[28] **Contracts**
Existence of Ambiguity

Words or phrases that have established definitions in common use or settled legal meanings are not rendered ambiguous merely because they are not defined in the document where they are used.

1 Cases that cite this headnote

[29] **Covenants**
General Rules of Construction

Covenant is ambiguous when it is capable of more than one reasonable interpretation on a

given issue.

[30] **Covenants**
General Rules of Construction

To determine whether or not a covenant is ambiguous, the court must view the agreement as a whole.

[31] **Covenants**
General Rules of Construction

Second step in contract or covenant construction depends on whether or not an ambiguity has been found; if the covenants are unambiguous, then the court must apply them as a matter of law.

[32] **Covenants**
General Rules of Construction
Covenants
Questions for Jury

If there is an ambiguity in the covenants, then interpretation is a question of fact, and the court must determine the intent of the parties at the time the instrument was drafted.

[33] **Covenants**
Nature and Operation in General

Judicial rewriting of restrictive covenants is prohibited.

[34] **Costs**
Declaratory Judgment
Specific Performance
Costs

Vendor was entitled as prevailing party to award of appellate attorney fees and costs under sale agreement in prospective purchasers' action seeking specific performance and declaratory relief concerning whether sale of subdivision lot was subject to original covenants or amended covenants; agreement provided that prevailing party in any legal action connected with agreement was entitled to recover fees and costs, including fees and costs on appeal. Appellate Rule 41.

8 Cases that cite this headnote

[35] **Costs**
Attorney Fees on Appeal or Error

Appellate rule providing procedure for requesting attorney fees on appeal allows Supreme Court to award attorney fees only if permitted by some other statutory or contractual authority; it is not authority alone for awarding fees. Appellate Rule 41.

8 Cases that cite this headnote

Attorneys and Law Firms

**688 *357 Bohner Law Office, Boise, for appellants. A.J. Bohner argued.

Westburg, McCabe & Collins, Boise, for respondent. William D. Collins argued.

Opinion

SCHROEDER, Justice.

This case involves a real estate purchase and sale agreement between Scott and Mary Shawver ("Shawvers")

and Huckleberry Estates, L.L.C. ("Huckleberry"). The Shawvers allege Huckleberry breached the sale agreement by making an invalid amendment to the restrictive covenants applicable to the property, which rendered the Shawvers' proposed house designs nonconforming. Both parties moved for summary judgment and the district court found Huckleberry in breach. Following a court trial on issues relating to the interpretation of the original covenants and appropriate damages, the district court awarded specific performance of the sale agreement in favor of the Shawvers, subject only to the original covenants. Both parties appealed.

I.

FACTUAL BACKGROUND

On November 9, 1999, Huckleberry and the Shawvers executed an agreement to reserve for the Shawvers the purchase of Lot 11, Block 2, of the Huckleberry Estates subdivision ("the Subdivision"). The sale was to close within 30 days of the recording of the final plat of Phase 1 of the Subdivision. Huckleberry's agent provided the Shawvers with a copy of the preliminary plat and restrictive covenants as then drafted ("Draft CC & Rs"). By signing the reservation agreement, the Shawvers acknowledged that they had received a copy of the restrictive covenants that applied to the lot, had familiarized themselves with the covenants and agreed to abide by them. The Draft CC & Rs provided in relevant part:

> c. MINIMUM BUILDING SIZE: All residential buildings erected upon said property shall have a finished floor area of not less then 2,200 square feet of ground area, exclusive of garages, carports, breezeways, storage rooms, porches or similar structures; or 2,600 square feet of finished area in the case of a two story house. All dwellings ****689 *358** must have at least a three-car garage, attached or detached. Lot 3 Block 4 shall be excepted from this condition and shall have a minimum residential finished floor area of 1,600 square feet on the ground floor level and a two-car garage.
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> ******
>
> r. DESIGN REVIEW: Grantor or other persons designated by Grantor shall review all structures and site plans prior to commencement of construction.

After signing the reservation agreement, the Shawvers designed a house for the Huckleberry property which met the square-footage requirements of the Draft CC & Rs. The plan was for a two-story structure with 1370 square feet on the first floor and 1770 square feet on the second floor. The Shawvers engaged a contractor to build the house.

On July 21, 2000, Huckleberry recorded the final plat and original CC & Rs for the Subdivision. The original recorded CC & Rs contained an amendment provision, which allowed amendment of any provision of the CC & Rs upon written approval of "at least seventy-five percent of the lot owners." The Shawvers received a copy of the original recorded CC & Rs on August 1, 2000. Aside from the addition of the amendment provision, the recorded CC & Rs did not differ from the Draft CC & Rs in any respect relevant to this case.

On July 28, 2000, a real estate purchase and sale agreement ("Sale Agreement") was initialed by Huckleberry[1] and delivered to the Shawvers by Huckleberry's real estate agent. The Shawvers signed the Sale Agreement and delivered it to Huckleberry's real estate agent on August 17, 2000. Pursuant to the agreement, the Shawvers were responsible for obtaining and reviewing a copy of the applicable CC & Rs. The Shawvers checked the corresponding "yes" box adjacent to this provision, indicating that they had in fact reviewed the applicable CC & Rs.

The Shawvers submitted site, floor and elevation plans for their home to Huckleberry on August 8, 2000. On August 11, 2000, Huckleberry returned those plans to the Shawvers and told the Shawvers that the plans had not been approved. Huckleberry subsequently recorded amendments to the original recorded CC & Rs ("First Amended CC & Rs") on August 28, 2000, which included an increase in the minimum square footage requirement for all homes built in the Subdivision. A copy of the First Amended CC & Rs was provided to the Shawvers on August 30, 2000. As amended, the CC & Rs prevented the Shawvers from constructing their home according to the plans they had previously designed and submitted to Huckleberry. The relevant amendments were as follows:

> Article I, Paragraph c. is hereby amended to read as follows:
>
> > c. MINIMUM RESIDENTIAL BUILDING FLOOR AREA: Floor area shall be exclusive of eaves, steps, porches, entrances patios and garages. The floor area of a one-story house shall have not less than two thousand two hundred (2,200) square feet on the ground floor. Two story houses shall have not less than a total of two thousand six hundred (2,600)

square feet and shall have the following minimums on each floor: one thousand six hundred (1,600) square feet on the ground floor and not less than 800 hundred (800) square feet on the second floor. All dwellings must have at least a three-car garage, attached or detached, which must be identical in architecture to the residential dwelling if detached. Lot 3 Block 4 shall be excepted from this condition and may have a total minimum floor area of one thousand (1,600) square feet and a two-car garage. The Architectural Committee shall have the discretion to reduce the minimum floor areas if the proposed design warrants such an adjustment. Provided, however, that the minimum ground floor area of any dwelling shall **690 *359 not be reduced below one thousand five hundred (1,500) square feet.

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Article I, Paragraph w. is hereby amended to read as follows:

w. DESIGN REVIEW: Grantor or other persons designated by Grantor, shall act as the Architectural Committee. The Architectural Committee shall consider and act upon any and all proposals or plans and specifications submitted for its approval pursuant to this Declaration, including the inspection of construction in conformance with plans approved by the Architectural Committee. The Architectural Committed shall have the power to determine, by rule or other written designation consistent with this Declaration, which types of improvements shall be submitted for Architectural Committee review and approval. The Architectural Committee shall approve proposals or plans and specifications submitted for its approval only if it deems that the construction, alternation, or additions contemplated thereby in the locations indicated are in conformity with this Declaration, and that the appearance of any structure affected thereby will be in harmony with the surrounding structures on other properties within the Subdivision.

Article l, Paragraph z. is hereby amended to read as follows:

z. AMENDMENTS: The Grantor reserves the right to amend this Declaration until all lots are sold in the subdivision. No amendments shall be made to this Declaration by any of the owners until ten (10) years after the date of the sale of the last lot in the subdivision and then such amendment may be only made by approval of seventy-five percent of the then lot owners.

On August 31, 2000, the Shawvers tendered to the closing agent, First American Title, the balance of the purchase price, but only if First American could assure them they were purchasing under the original recorded CC & Rs and not the First Amended CC & Rs. When First American refused to close under these conditions the Shawvers filed suit against Huckleberry.

II.

PROCEDURAL BACKGROUND

On September 1, 2000, the Shawvers filed a complaint against Huckleberry seeking specific performance of the Sale Agreement. The Shawvers amended their complaint on March 7, 2001, to add damages as an alternative basis for relief and to seek a declaration that the August 28, 2000 amendments to the CC & Rs were void. Huckleberry answered the Shawvers' amended complaint and counterclaimed.

On June 1, 2002, the parties submitted cross motions for summary judgment. The Shawvers claimed that the First Amended CC & Rs were invalid because Huckleberry alone did not constitute seventy-five percent of the lot owners, the percentage required for the adoption of a valid amendment under the original recorded CC & Rs. They also asserted that Huckleberry's invalid amendment to the original CC & Rs constituted a breach of the covenant of good faith and fair dealing and that Huckleberry was prevented from amending the original CC & Rs by the doctrine of quasi estoppel. Huckleberry claimed that summary judgment was inappropriate because a contested issue of material fact existed regarding representations made to the Shawvers by Huckleberry's agent concerning the applicability of the Draft CC & Rs. Alternatively, Huckleberry claimed that it was entitled to summary judgment because the Shawvers were seeking to reform the parties' agreements, which could not be accomplished through application of specific performance or the implied covenant of good faith and fair dealing.

On July 23, 2001, Huckleberry recorded a second amendment to the original recorded CC & Rs ("Second Amended CC & Rs"). The Second Amended CC & Rs included essentially the same provisions as the First Amended CC & Rs with the exception of the provision for amendments which was **691 *360 changed to remove the grantor's reservation. Unlike the First Amended CC &

Rs, the Second Amended CC & Rs were approved by over seventy-five percent of the existing lot owners in compliance with the amendment provision contained in the original recorded CC & Rs. Neither party has challenged the validity of the Second Amended CC & Rs.

On October 3, 2001, the district court issued its memorandum decision, finding that any contested issue regarding the applicability of the Draft CC & Rs was immaterial because there was no significant difference between the Draft CC & Rs and the original recorded CC & Rs. The district court also found Huckleberry in breach of the Sale Agreement.

The case proceeded to trial on issues relating to the interpretation of the design review provision of the original recorded CC & Rs, the appropriate remedy for the breach and Huckleberry's counterclaim concerning a lis pendens filed by the Shawvers in connection with the lawsuit. The district court found that the only reasonable interpretation of the design review provision was that it allowed the grantor to enforce conformity with the specific provisions of the original recorded CC & Rs and that the Shawver's proposed house designs were compliant. The district court concluded that the Shawvers are entitled to specific performance of the Sale Agreement, subject only to the original recorded CC & Rs. The district court determined that, "[t]he subsequent amendments have no application to [the Sale Agreement]." Huckleberry's counterclaim was denied. Subsequently, the district court entered its judgment and an order staying the judgment. The Shawvers were awarded attorney fees and costs.

Both parties appealed. Huckleberry claims that the district court erred in awarding specific performance of the Sale Agreement subject only to the original recorded CC & Rs. Huckleberry also challenges the award of attorney fees and costs in favor of the Shawvers. The Shawvers contend that the district court erred by not offsetting the award of attorney fees and costs against the amount they owe Huckleberry in order to close on the purchase of the lot. Both parties seek attorney fees on appeal.

III.

THE DISTRICT COURT ERRED IN HOLDING THAT HUCKLEBERRY BREACHED THE AGREEMENT BY AMENDING THE CC & RS AND ERRED IN GRANTING THE SHAWVERS SPECIFIC PERFORMANCE

Huckleberry argues that the district court erred in ruling, as a matter of law, that it breached the Sale Agreement by attempting to amend the CC & Rs and that the Shawvers were entitled to specific performance of the Sale Agreement under the original recorded CC & Rs.

A. Standard of Review

[1] [2] On appeal from the grant of a motion for summary judgment, this Court employs the same standard as used by the district judge originally ruling on the motion. *Wensman v. Farmers Ins. Co. of Idaho,* 134 Idaho 148, 151, 997 P.2d 609, 612 (2000) (citing *McKay v. Owens,* 130 Idaho 148, 152, 937 P.2d 1222, 1226 (1997)). Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). The fact that both parties move for summary judgment does not in and of itself establish that there is no genuine issue of material fact. *Kromrei v. AID Ins. Co.,* 110 Idaho 549, 551, 716 P.2d 1321 (1986) (citing *Casey v. Highlands Ins. Co.,* 100 Idaho 505, 507, 600 P.2d 1387, 1389 (1979)). The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review, and this Court must evaluate each party's motion on its own merits. *Stafford v. Klosterman,* 134 Idaho 205, 207, 998 P.2d 1118, 1119 (2000) (citing *Bear Island Water Ass'n, Inc., v. Brown,* 125 Idaho 717, 721, 874 P.2d 528, 532 (1994)).

[3] [4] Neither party in this case made a demand for a jury trial. When an action will be tried before the court without a jury, the ****692 *361** trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences. *Id.* (citing *Brown v. Perkins,* 129 Idaho 189, 191, 923 P.2d 434, 436 (1996); *Loomis v. Hailey,* 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991)). The test for reviewing the inferences drawn by the trial court is whether the record reasonably supports the inferences. *Id.* (citing *Walker v. Hollinger,* 132 Idaho 172, 176, 968 P.2d 661, 665 (1998); *Riverside Dev. Co. v. Ritchie,* 103 Idaho 515, 518–19, 650 P.2d 657, 660–61 (1982)).

B. The district court erred by finding Huckleberry in breach of the Sale Agreement.

[5] The district court concluded that Huckleberry breached the Sale Agreement when it made an invalid amendment to the original recorded CC & Rs. Huckleberry claims that this decision constituted error because the First Amended CC & Rs, though invalid, did not violate the terms of the

Sale Agreement.

[6] [7] [8] [9] [10] [11] [12] When the language of a contract is clear and unambiguous, its interpretation and legal effect are questions of law. *State v. Barnett,* 133 Idaho 231, 234, 985 P.2d 111, 114 (1999). An unambiguous contract will be given its plain meaning. *Id.* The purpose of interpreting a contract is to determine the intent of the contracting parties at the time the contract was entered. *Opportunity, L.L.C. v. Ossewarde,* 136 Idaho 602, 607, 38 P.3d 1258, 1263 (2002) (citing *Rutter v. McLaughlin,* 101 Idaho 292, 612 P.2d 135 (1980)). In determining the intent of the parties, this Court must view the contract as a whole. *Daugharty v. Post Falls Highway Dist.,* 134 Idaho 731, 735, 9 P.3d 534, 538 (2000). If a contract is found ambiguous, its interpretation is a question of fact. *Id.* (citing *Electrical Wholesale Supply Co., Inc. v. Nielson,* 136 Idaho 814, 823, 41 P.3d 242, 251 (2002)). Whether a contract is ambiguous is a question of law. *Boel v. Stewart Title Guar. Co.,* 137 Idaho 9, 13, 43 P.3d 768, 772 (2002) (citing *Terteling v. Payne,* 131 Idaho 389, 391–92, 957 P.2d 1387, 1389–90 (1998)). Whether the facts establish a violation of the contract is a question of law reviewed de novo. *Barnett,* 133 Idaho at 234, 985 P.2d at 114 (citing *United States v. Plummer,* 941 F.2d 799, 803 (9th Cir.1991)).

The original recorded CC & Rs, which were incorporated by reference into the Sale Agreement, provided in relevant part:

> GENERAL COVENANTS AND RESTRICTIONS: That all lots of said Huckleberry Estates Subdivision shall be subject to the following covenants, conditions, and restrictions, that by acceptance of any such conveyance, the grantee or grantees and their heirs, executors, administrators, successors, and assigns agree to the conditions described as follows:
>
> ******
>
> z. AMENDMENTS: Any amendment to these covenants, conditions, and restrictions shall be approved in writing by at least seventy-five percent of the lot owners.

The Shawvers received a copy of the original recorded CC & Rs on August 1, 2000. On August 17, 2000, Scott and Mary Shawver both signed the Sale Agreement with Huckleberry. Paragraph five of the Sale Agreement provided that "buyer hereby acknowledges copies of the recorded plat & CCR's." Paragraph sixteen provided that the Shawvers were responsible to obtain and review the applicable CC & Rs. Pursuant to paragraph sixteen, the Shawvers checked the corresponding "yes" box adjacent to this provision, indicating that they had in fact reviewed the applicable CC & Rs.

[13] [14] "A breach of contract occurs when there is a failure to perform a contractual duty." *Daniels v. Anderson,* 113 Idaho 838, 840, 748 P.2d 829, 831 (Ct.App.1987) (citation omitted). The Shawvers contend that Huckleberry breached the Sale Agreement by recording the First Amended CC & Rs because Huckleberry had a contractual duty to convey the property to the Shawvers subject only to the original recorded CC & Rs. This argument is inconsistent with the language of the Sale Agreement. Under the express terms of the Sale Agreement, the ****693 *362** Shawvers agreed to purchase property governed by restrictive covenants, which could be amended by written consent of seventy-five percent of the existing lot owners. Such agreements are valid under the law. *See* 20 AM.JUR.2D *Covenants* § 236 (1995) ("[T]he restrictive agreements in a tract of land may provide for a method of abrogating or modifying such agreements, as, for example, by vote of a certain proportion of the property owners."). The Shawvers had no right under the Sale Agreement to override the amendment provision or to avoid compliance in the event amendments were properly adopted. "Courts do not possess the roving power to rewrite contracts in order to make them more equitable." *Smith v. Idaho State Univ. Fed. Credit Union,* 114 Idaho 680, 684, 760 P.2d 19, 23 (1988) (citation omitted). The Shawvers' position that the Sale Agreement was subject only to the original recorded CC & Rs is contrary to the agreement they made.

[15] [16] [17] The Shawvers also claim that Huckleberry's conduct constituted a breach of the covenant of good faith and fair dealing. The implied covenant of good faith and fair dealing is a covenant implied by law in the parties' contract. *Idaho Power Co. v. Cogeneration, Inc.,* 134 Idaho 738, 750, 9 P.3d 1204, 1216 (2000). No covenant will be implied which is contrary to the terms of the contract negotiated and executed by the parties. *See First Sec. Bank of Idaho v. Gaige,* 115 Idaho 172, 176, 765 P.2d 683, 687 (1988); *Clement v. Farmers Ins. Exch.,* 115 Idaho 298, 300, 766 P.2d 768, 770 (1988) (an implied covenant of good faith and fair dealing cannot override an express provision in a contract). The covenant requires that the parties perform, in good faith, the obligations imposed by their agreement, and a violation of the covenant occurs only when either party violates, nullifies or significantly impairs any benefit of the contract. *See Idaho First Nat. Bank v. Bliss Valley Foods, Inc.,* 121 Idaho 266, 289, 824 P.2d 841, 863 (1991).

Under the express provisions of the Sale Agreement,

amendments to the existing CC & Rs could be adopted upon written consent of at least seventy-five percent of the existing lot owners. To imply that Huckleberry was obligated to perform the Sale Agreement subject only to the original recorded CC & Rs would be contrary to the terms of the contract negotiated and executed by the parties.

Huckleberry's first recorded amendments to the CC & Rs were unenforceable against the Shawvers because they were not adopted in compliance with the applicable amendment provision. This action did not breach the implied covenant of good faith. As applied to the Sale Agreement, the First Amended CC & Rs were simply void, and therefore the Shawvers were not deprived of any benefit under their contract with Huckleberry.

The district court's determination that Huckleberry was in breach of the Sale Agreement was in error.

IV.

THE DISTRICT COURT ERRED IN HOLDING THAT THE SECOND AMENDED CC & RS DID NOT APPLY TO THE LOT THE SHAWVERS WISH TO PURCHASE FROM HUCKLEBERRY

Huckleberry claims that the district court erred in holding that the Second Amended CC & Rs did not apply to the Shawvers' purchase of the lot in question. Specifically, Huckleberry claims that under the express terms of the parties' agreement, amendments to the original CC & Rs could be adopted at any time upon the written consent of at least seventy-five percent of the existing lot owners.

The Second Amended CC & Rs were adopted and recorded on July 23, 2001. A copy of these amendments, along with the lot owners' notarized signatures, were made part of the record before the district court. Huckleberry argues that the district court's order in this case essentially redrafted the parties' agreement by allowing the Shawvers to avoid compliance with the Second Amended CC & Rs or other future amendments despite their unchallenged validity or application to the property in question.

The Shawvers do not challenge the validity of the amendment provision contained in the **694 *363 original recorded CC & Rs or the fact that the Second Amended CC & Rs were properly adopted in compliance with that provision. They contend that the adoption of the Second Amended CC & Rs prevented Huckleberry from being able to convey the property according to the terms of the Sale Agreement.

The Shawvers also claim that they are entitled to recoup damages associated with complying with the Second Amended CC & Rs in the event this Court holds that they are applicable in this case. According to the Shawvers, their damages amount to $16,000, the cost of increasing the size of their home to make it meet the requirements of the Second Amended CC & Rs. The Shawvers request that the district court be directed to consider and enter judgment for that additional cost should the Shawvers be required to comply with the Second Amended CC & Rs.

A. Standard of Review

[18] [19] [20] [21] [22] This Court exercises free review over the district court's conclusions of law. *Trimble v. Engelking,* 134 Idaho 195, 196, 998 P.2d 502, 503 (2000). The standard of review of a non-jury district court's findings of fact is set forth in Idaho Rule of Civil Procedure 52(a). *Williamson v. City of McCall,* 135 Idaho 452, 19 P.3d 766, 769 (citing I.R.C.P. 52(a)). I.R.C.P. 52(a) provides in pertinent part:

> In all actions tried upon the facts without a jury ... the court shall find the facts specifically and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. Findings of fact shall not be set aside unless clearly erroneous. In application of this principle regard shall be given to the special opportunity of the trial court to judge the credibility of those witnesses that appear before it.

Id. (quoting I.R.C.P. 52(a)). "In determining whether a finding is clearly erroneous this Court does not weigh the evidence as the district court did. The Court inquires whether the findings of fact are supported by substantial and competent evidence." *Id.* (citation omitted). "This Court will not substitute its view of the facts for the view of the district judge." *Id.* (citation omitted). "Evidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact had been proven." *Id.*

B. The district court erred by determining that performance of the Sale Agreement was subject only to the original recorded CC & Rs.

[23] The district court concluded that the Shawvers were entitled to specific performance of the Sale Agreement and that "[t]his purchase and sale transaction is subject to the Declaration of Protective Covenants, Conditions, and

Restrictions for Huckleberry Estates Subdivision recorded July 21, 2000 as Instrument No. 100057017, only, as and for [sic] restrictive covenants." Huckleberry claims that the district court's decision constitutes error because it effectively prevents the adoption and enforcement of future amendments to the existing CC & Rs with regard to the Shawvers only and violates the express terms of the parties' agreement.

[24] [25] [26] Idaho recognizes the validity of covenants that restrict the use of private property. *Nordstrom v. Guindon,* 135 Idaho 343, 345, 17 P.3d 287, 290 (2000) (citing *Brown v. Perkins,* 129 Idaho 189, 192, 923 P.2d 434, 437 (1996)). When interpreting such covenants, the Court generally applies the same rules of construction as are applied to any contract or covenant. *Id.* However, because restrictive covenants are in derogation of the common law right to use land for all lawful purposes, the Court will not extend by implication any restriction not clearly expressed. *Post v. Murphy,* 125 Idaho 473, 475, 873 P.2d 118, 120 (citing *Thomas v. Campbell,* 107 Idaho 398, 404, 690 P.2d 333, 339 (1984)). Further, all doubts are to be resolved in favor of the free use of land. *Id.*

[27] [28] [29] [30] Beginning with the plain language of the covenant, the first step is to determine whether or not there is an ambiguity. *Brown,* 129 Idaho at 193, 923 P.2d at 437 (citing *City of Chubbuck v. City of Pocatello,* 127 Idaho 198, 201, 899 P.2d 411, 414 (1995)). "Words or phrases that have established definitions in common use or settled legal meanings are not rendered ambiguous ****695 *364** merely because they are not defined in the document where they are used." *City of Chubbuck,* 127 Idaho at 201, 899 P.2d at 414. Rather, a covenant is ambiguous when it is capable of more than one reasonable interpretation on a given issue. *Post,* 125 Idaho at 475, 873 P.2d at 120 (citing *Rutter v. McLaughlin,* 101 Idaho 292, 612 P.2d 135 (1980)). To determine whether or not a covenant is ambiguous, the court must view the agreement as a whole. *Brown,* 129 Idaho at 193, 923 P.2d at 438.

[31] [32] The second step in contract or covenant construction depends on whether or not an ambiguity has been found. If the covenants are unambiguous, then the court must apply them as a matter of law. *City of Chubbuck,* 127 Idaho at 201, 899 P.2d at 414. "Where there is no ambiguity, there is no room for construction; the plain meaning governs." *Post,* 125 Idaho at 475, 873 P.2d at 120. Conversely, if there is an ambiguity in the covenants, then interpretation is a question of fact, and the Court must determine the intent of the parties at the time the instrument was drafted. *Brown,* 129 Idaho at 193, 923 P.2d at 438.

Both parties agree that the original recorded CC & Rs were applicable when the Sale Agreement was executed. The original recorded CC & Rs provide in relevant part:

> GENERAL COVENANTS AND RESTRICTIONS: That all lots of said Huckleberry Estates Subdivision shall be subject to the following covenants, conditions, and restrictions, that by acceptance of any such conveyance, the grantee or grantees and their heirs, executors, administrators, successors, and assigns agree to the conditions described as follows:
>
> ******
>
> z. AMENDMENTS: Any amendment to these covenants, conditions, and restrictions shall be approved in writing by at least seventy-five percent of the lot owners.

Paragraph z simply states that any amendment may be adopted upon the written consent of at least seventy-five percent of the existing lot owners. Because there is no ambiguity in this language, "there is no room for construction, and the plain meaning of the language governs." *Sun Valley Ctr. v. Sun Valley Co.,* 107 Idaho 411, 413, 690 P.2d 346, 348 (1984). Huckleberry concedes that the First Amended CC & Rs were invalid because they were not adopted in compliance with the amendment provision. However, Huckleberry contends that the Second Amended CC & Rs, which were recorded on July 23, 2001, were properly adopted by over seventy-five percent of the existing lot owners. These amendments are currently in effect throughout the Subdivision. The issue is whether the district court erred in declaring that the Second Amended CC & Rs had no application to the parties' agreement in this case.

The district court concluded that "the Shawvers are entitled to specific performance of the [Sale Agreement], which is subject to the original CC & R's. The subsequent amendments have no application to that agreement." The Shawvers subsequently filed a motion to alter or amend the judgment to include a finding that a second set of house plans submitted by the them in January 2001 as part of an attempt to settle this matter, comply in all respects with the First Amended and Second Amended CC & Rs. The district court denied the motion, stating that, "[w]hile there was some discussion of the Second Amended CC & R's at trial in the context of whether specific performance as originally requested by Plaintiffs should be granted, the issue of different plans and compliance with any of the amended CC & R's was not litigated."

[33] Under the terms of the Sale Agreement, the Shawvers

acknowledged that they had received and reviewed a copy of the applicable CC & Rs. When the Shawvers and Huckleberry negotiated and executed the Sale Agreement, presumably they expected that it would be fully valid and enforceable. *See Coeur d'Alene Lakeshore Owners & Taxpayers v. Kootenai County,* 104 Idaho 590, 595, 661 P.2d 756, 761 (1983) (courts presume that parties to a contract intended a lawful construction of that contract). Because the Shawvers had notice of the applicable CC & Rs, they were bound to abide by them. *See* ****696 *365** 20 Am.Jur.2d *Covenants* § 267 (1995) ("A purchaser with notice of restrictive covenants upon land is bound by such restrictions, although they are not such as in strict legal contemplation run with the land."). The practical effect of the district court's decision is to release the Shawvers from their legal obligation to abide by future amendments regardless of the validity or necessity of such amendments. "Courts possess no roving commission to rewrite contracts. Equity will not intervene to change the terms of a contract unless it produces unconscionable harm, is unlawful or violates public policy." *Smith v. Idaho State Univ. Fed. Credit Union,* 114 Idaho 680, 684, 760 P.2d 19, 23 (1988) (quoting *Quintana v. Anthony,* 109 Idaho 977, 981, 712 P.2d 678, 682 (Ct. App. 1985). A parallel measure of judicial restraint prohibits the judicial rewriting of restrictive covenants.

The district court's order eliminates the terms of the original recorded CC & Rs with respect to future amendments. The trial court's order granting specific performance of the Sale Agreement subject only to the original recorded CC & Rs is in error. There is doubtless a point when a party has changed his or her position in reliance upon the covenants in effect to a degree that enforcement of an amendment would be precluded, but that point was not demonstrated in this case. The issue of whether the Shawvers could have rescinded the Sale Agreement is not before this Court.

V.

HUCKLEBERRY IS ENTITLED TO ATTORNEY FEES AND COSTS

[34] [35] Idaho Appellate Rule (I.A.R.) 41 provides the procedure for requesting attorney fees on appeal. I.A.R. 41 allows this Court to award attorney fees only if permitted by some other statutory or contractual authority; it is not authority alone for awarding fees. *Robbins v. County of Blaine,* 134 Idaho 113, 120, 996 P.2d 813, 820 (2000). I.A.R. 41 requires that the request for attorney fees on appeal be made in the first brief from the respective party. I.A.R. 35(a)(5) and (6) also require that the requesting party put the request for fees in a separate section after the issues presented section and the request be discussed in the argument section. These procedural requirements have been met as Huckleberry made the request after the issues on appeal section in their first brief and the request was discussed in the argument section.

In this case the authority permitting the recovery of attorney fees and costs is contractual. Paragraph fourteen of the Sale Agreement provides that, "[i]f either party initiates or defends any arbitration or legal action or proceedings, which are in any way connected with this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party reasonable costs and attorney's fees, including such costs and fees on appeal." Huckleberry is the prevailing party on appeal and is awarded attorney fees and costs associated with the original trial as well as its appeal to this Court.

VI.

CONCLUSION

The decision of the district court is reversed. Attorney fees and costs are awarded to Huckleberry.

Chief Justice TROUT, Justices EISMANN and BURDICK concur.

Justice KIDWELL, dissents without opinion.

Parallel Citations

93 P.3d 685

Footnotes

1 Neither party disputes the fact that Huckleberry's initialing of the Sale Agreement constituted a valid execution of the Sale Agreement by Huckleberry.

End of Document

666 F.3d 599
United States Court of Appeals, Ninth Circuit.

Devon S. SHELLEY, Plaintiff–Appellant,
v.
Pete GEREN, Secretary of the Army, United States Army Corps of Engineers, Agency, Defendant–Appellee.

No. 10–35014. | Argued and Submitted Nov. 4, 2010. | Filed Jan. 12, 2012.

Synopsis

Background: Employee brought action against Secretary of the Army and the Army Corps of Engineers, alleging that failure to promote violated the Age Discrimination in Employment Act (ADEA). The United States District Court for the Eastern District of Washington, Robert H. Whaley, J., granted Secretary's motion for summary judgment. Employee appealed.

Holdings: The Court of Appeals, Wilken, District Judge, held that:
[1] claims accrued on date employee was denied opportunity to interview;
[2] genuine issue of material fact existed as to whether supervisors considered age and projected retirement relevant to the hiring decision; and
[3] genuine issue of material fact existed as to whether selecting candidate for position because it was a lateral move was pretext for age discrimination.

Reversed and remanded.

Bybee, Circuit Judge, filed an opinion concurring in part and dissenting in part.

West Headnotes (7)

[1] **Civil Rights**
Exhaustion of Administrative Remedies Before Resort to Courts
Officers and Public Employees
Prohibited personnel practices; discrimination

Federal employees who believe they have been discriminated against on the basis of age have the option of pursuing administrative remedies, either through the agency's Equal Employment Opportunity procedures, or through the Merit Systems Protection Board.

[2] **Civil Rights**
Operation; accrual and computation

Forty-five day period in which to file administrative complaint for employee's claims of age discrimination in relation to non-selection for promotion to a temporary position and non-interview for permanent position accrued on date he was denied opportunity to interview, as required for employee to bring claims under the Age Discrimination in Employment Act (ADEA) against Secretary of the Army and the United States Army Corps of Engineers; decisions were part of a single, two-step hiring process, selection to temporary position gave advantage in hiring decision for permanent position, and, even if each was a discrete employment action, investigation of non-interview to permanent position would have led to investigation of hiring process for temporary position. Age Discrimination in Employment Act of 1967, 2 et seq., 29 U.S.C. § 621 et seq.

[3] **Civil Rights**
Motive or intent; pretext

To prevail on a claim for age discrimination under the Age Discrimination in Employment Act (ADEA), a plaintiff must prove at trial that age was the but-for cause of the employer's adverse action; unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1); Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
4 Cases that cite this headnote

[4] **Civil Rights**
Practices prohibited or required in general; elements

In a failure-to-promote case under the Age Discrimination in Employment Act (ADEA), a plaintiff may establish a prima facie case of discrimination in violation of the ADEA by producing evidence that he or she was: (1) at least forty years old; (2) qualified for the position for which an application was submitted; (3) denied the position; and (4) the promotion was given to a substantially younger person. Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1).

2 Cases that cite this headnote

[5] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Genuine issue of material fact existed as to whether supervisors considered age and projected retirement relevant to the hiring decision, precluding summary judgment in 54 year old employee's action alleging non-promotion and non-interview were age discrimination in violation of the Age Discrimination in Employment Act (ADEA). Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1).

[6] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Genuine issue of material fact existed as to whether selecting candidate for position because it was a lateral move, rather than promoting 54 year old employee, was pretext for age discrimination, as required for employee's action under the Age Discrimination in Employment Act (ADEA). Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1).

1 Cases that cite this headnote

[7] **Civil Rights**
Motive or intent; pretext

In an employment discrimination action, evidence of a plaintiff's superior qualifications, standing alone, may be sufficient to prove pretext in a stated legitimate, non-discriminatory reason for an adverse employment action.

1 Cases that cite this headnote

Attorneys and Law Firms

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***601** James A. McDevitt, United States Attorney, Frank A. Wilson, Assistant United States Attorney, Spokane, Washington; William E. Edwards, United States Army Corps of Engineers, Kansas City, MO, for the defendant-appellee.

Appeal from the United States District Court for the Eastern District of Washington, Robert H. Whaley, District Judge, Presiding. D.C. EDWA No. 08–cv–5045–RHW.
Before: BETTY B. FLETCHER and JAY S. BYBEE, Circuit Judges, and CLAUDIA WILKEN, District Judge.*

Opinion

Opinion by Judge WILKEN; Partial Concurrence and Partial Dissent by Judge BYBEE.

OPINION

WILKEN, District Judge:

Plaintiff–Appellant Devon Scott Shelley appeals the district court's grant of summary judgment in favor of Defendant–Appellee Pete Geren, Secretary of the Army

and the United States Army Corps of Engineers (collectively, the Corps). Shelley sued the Corps for violating the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, by failing to interview him and rejecting his applications for two promotions. We have jurisdiction pursuant to 28 U.S.C. § 1291 to consider Shelley's appeal. We find that Shelley presented a prima facie case of age discrimination and evidence of pretext sufficient to create a material dispute as to whether age-related bias was the "but-for" cause of the Corps' failure to interview and promote him. The district court's grant of summary judgment in favor of the Corps is reversed.

BACKGROUND

In 2005, the Corps sought to fill a GS–14 Supervisory Procurement Analyst position in the Contracting Division at its Kansas City District. The position was also known as Chief of Contracting. The Corps pursued a two-step hiring process, in which it advertised an opening for a 120–day temporary position, and then announced a formal process to hire a permanent Chief of Contracting.

An email announcement of the 120–day position was made on October 3, 2005, and courtesy copies were sent to Major Kelly Butler and Regional Contracting Chief Joseph Scanlan. The announcement explained that recruitment for the permanent position would begin in the near future. Applicants were instructed to email or fax their current resume/application, copies of their two most recent performance appraisals, proof that they had completed the educational requirements, and proof of eligibility for a Critical Acquisition Position.

Shelley applied for the 120–day position. At the time, he had been serving as Assistant Chief of the Contracting Division for the Walla Walla District, a GS–13 position, for over a year. In that position, Shelley supervised, coordinated, and managed the work of Team Leaders. Shelley was supervised by Connie Oberle, the Chief of Contracting at Walla Walla. He held a master's degree in business administration, had twenty-nine years of experience in contracting (twenty-six of which were with the Corps), and had received numerous awards for his work. In 2005, Shelley ***602** had received a "Special Act Award" for "major acquisition accomplishments and acquisition research [and] policy." In 2003, he had received a Bronze Star Medal for exceptionally meritorious acquisition service as a Contracting Officer with the Corps while deployed to the Afghanistan Area Office. He was born in 1951 and was fifty-four years old at the time of his application for the 120–day position.

Butler served as the selecting official for the 120–day position. She received about nine resumes and rated them according to the criteria from the position announcement, which she summarized as "[b]asically their experience." No other officials reviewed the resumes for the 120–day position. Butler also spoke with the applicants' references.

Butler testified that Oberle gave a negative reference for Shelley. She stated, "I called Connie for a reference for [Shelley]. And, really, Connie's reference is why we did not choose [Shelley]." Butler explained, "When I get a big No feeling from the supervisor, that sends a red flag." Later, Butler changed her testimony, stating that Oberle's reference was "one of the reasons we did not choose [Shelley]." Oberle, however, denied ever having spoken with Butler regarding Shelley's qualifications. Oberle testified that she spoke with Scanlan and informed him that Shelley was interested in the 120–day position, and that the job would be a "wonderful opportunity for him."

Butler consulted about the applicants with Colonel Michael Rossi, Commander of the Kansas City District, and Steve Iverson, Deputy District Engineer for Project Management for the same district. They agreed that Vince Marsh should be hired. Marsh was serving as a Supervisory Procurement Analyst and Chief of the Business Management Division in Huntsville, Alabama, a GS–14 position, and had been serving in the position for more than a year. He supervised approximately fifteen employees and served as Director of Contracting for the Business Management Division "as requested." In his prior position, as Business Operations Manager at the United States Army Contracting Command in Europe, Marsh had also served as Director of Contracting "as requested," supervising seventy-five contract specialists on those occasions. He was forty-two years old at that time, born in 1963. He had twenty years of experience in contracting (fourteen in contracting positions and six in procurement positions). He had been with the Corps for less than two years. The most recent award listed on Marsh's resume was a "Sustained Superior Performance Award" he had received in 2002, before joining the Corps.

Butler interviewed Marsh for the position. There is no evidence that she interviewed other candidates.

On November 2, 2005, Kevin Brice, Business Management Division Chief, sent an email seeking approval to hire Marsh for the 120–day position. Brice stated that he and Rossi recommended Marsh for the position, that Scanlan had participated in the selection process, and that Butler believed Marsh was Scanlan's top pick. Marsh's selection was approved.

Scanlan knew Shelley and was aware that Shelley was in

his fifties. Scanlan had served as a superior to Shelley, and had worked with him for about six years. He was familiar with Shelley's credentials and experience working for the Corps. He knew that, as Assistant Chief of Contracting for the Walla Walla District, Shelley had, at various times, served as Acting Chief of Contracting when Oberle was absent. Scanlan expressed confidence in Shelley's performance of his duties as Acting Chief of Contracting and testified that ***603** both technically and professionally Shelley was a good contracting officer.

At the time Scanlan supported Marsh for the 120–day position, he knew Marsh only by reputation. They had met at a social event for the Army Contracting Command in Germany. Scanlan's belief that Marsh was the best candidate for the 120–day position was not based on any personal experience working with him. Scanlan, however, told Butler, Brice, Iverson, Rossi and Kevin Bond, District Counsel Chief, who later joined the selection panel for the permanent position, that he had worked with Marsh in Germany, and that he believed Marsh would do very well in the 120–day position.

Shelley learned that he was not selected for the 120–day position on or about November 4, 2005.

Meanwhile, on October 24, 2005, the permanent position and job description had been announced, and the Corps began accepting applications. The selection plan called for a panel of five members to review applications. The panel members were Scanlan, Brice, Rossi, Bond, and Mary Parks, Chief Contracting Specialist. Scanlan, Brice and Rossi had all participated in the hiring decision for the 120–day position. Rossi was assigned to chair the panel.

The selection plan identified four criteria on which to screen applicants for interviews: technical competency, management skills, leadership and teamwork. On each criterion, the applicants were to be evaluated as "outstanding," "fully successful," or "minimally acceptable." Possession of a graduate level degree was a factor in ranking a candidate as outstanding for technical competency. A factor to be considered with regard to management skills was supervision of over thirty employees.

Oberle testified that, around the time the hiring process was taking place, Scanlan and Brice requested from the contracting chiefs information about projected retirement dates for employees in their districts and divisions. Scanlan did not recall asking his chiefs for information on retirement eligibility. He admitted, though, that in 2004 or 2005 he had requested, from the districts, certain data which, at that time, was provided in a spreadsheet entitled Capable Workforce Matrix. Although the matrix did not include the names of the employees, it included information such as job titles, grade levels, number of employees in a particular position in a division, as well as their anticipated retirement dates. The example in the record of this matrix for the Walla Walla Contracting Division is dated March 21, 2006, but apparently the same format was used in 2004 and 2005. It is clear from the 2006 version of the matrix for the Walla Walla Contracting Division that it would be a simple matter to deduce the names of the incumbents from the position titles within the division.

Thirty-three individuals applied for the permanent position, including Shelley, Marsh, and Oberle. The panel members independently evaluated the applicants as outstanding, fully successful, or minimally acceptable, on each of the four selection criteria, based on their resumes. On December 19, 2005, the panel members convened by teleconference to select candidates for interviews. Scanlan testified that he did not share any age-related information about Shelley at the teleconference. Brice testified that age was not a consideration in evaluating the applicants, although information on the resumes could allow panelists to estimate applicants' ages.

During the teleconference, each panelist placed the candidates in either the top ***604** third, middle third, or bottom third of the applicant pool. The spreadsheet summarizing these scores does not identify the panelists by name, but it shows that two candidates received a top score from each of the five panelists. Marsh and another candidate received four top scores and a mid score. A fifth candidate received four top scores and a bottom score. An applicant named Robert received three top scores and two mid scores. These were the six candidates selected for interviews. Shelley was given a top score by three of the five panelists. He was initially given a mid score by two panelists. This ranking would have been equal to that which had earned Robert an interview. But one panelist—whose identity is not disclosed in the record—changed Shelley's mid score to a bottom score. Shelley was not given an interview.

Marsh was, at forty-two years old, the youngest interviewee. The oldest interviewee was fifty-five years old, one year older than Shelley. The other interviewees were forty-six (two of them), fifty, and fifty-three years old.

On January 20, 2006, the panel recommended Marsh for the permanent position. On or about February 17, 2006, Shelley learned that he had not been afforded an opportunity to interview for the permanent position. On April 16, 2006, Marsh was reassigned to the permanent Chief of Contracting position.

On March 6, 2006, seventeen days after Shelley learned that he had been denied an interview for the permanent position, he made initial contact with the Corps' Equal Employment Opportunity (EEO) officer. On May 12, 2006, after receiving notice of his right to file a formal complaint of discrimination, Shelley did so, alleging that he had been discriminated against between November 2005 and January 2006 due to his age, in that he was "not afforded the anticipated interview opportunity ... thereby eliminating his promotion opportunity for the Kansas City District GS–14, Chief, Contracting Division position." After the EEO office denied his claim in its Final Agency Action on June 27, 2008, Shelley filed suit in federal district court on July 28, 2008.

The district court granted summary judgment in favor of the Corps. The court assumed, without deciding, that Shelley timely exhausted his administrative remedies as to both the 120–day position and the permanent position. The court declined to analyze the motion in accordance with *McDonnell Douglas Corporation v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), finding it inapplicable to ADEA cases after the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.,* 557 U.S. 167, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009). Relying on *Gross,* the district court held that Shelley put forth insufficient facts that his age was the "but-for" cause of his non-selection for the 120–day position and for an interview for and promotion to the permanent position.

Shelley appeals.

STANDARD OF REVIEW

We review de novo a district court's grant of summary judgment. *Bagdadi v. Nazar,* 84 F.3d 1194, 1197 (9th Cir.1996). We must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact, and whether the district court applied the relevant substantive law. *Id.* "Whether a plaintiff has exhausted administrative remedies as required before filing suit is a question of law, which we review de novo." *Bankston v. White,* 345 F.3d 768, 770 (9th Cir.2003).

*605 DISCUSSION

I. Administrative Remedies

Preliminarily, the Corps argues that we may not consider Shelley's complaint of non-selection for the 120–day position because he failed to seek administrative remedies for that decision in a timely manner. The Corps argues that Shelley failed to contact the EEO office within forty-five days of learning that he was not selected for the 120–day position and failed to complain about his non-selection for the 120–day position in his formal complaint of discrimination in the EEO administrative process.

[1] Federal employees who believe they have been discriminated against on the basis of age have "the option of pursuing administrative remedies, either through the agency's EEO procedures, or through the Merit Systems Protection Board." *Bankston,* 345 F.3d at 770 (internal citations omitted). Equal Employment Opportunity Commission (EEOC) regulations provide that an aggrieved federal employee who pursues the EEO avenue must consult an EEO counselor within forty-five days of the effective date of the contested personnel action, prior to filing a complaint alleging age discrimination. 29 C.F.R. §§ 1614.103, 1614.105(a)(1).1 We have stated that

> although the regulatory pre-filing exhaustion requirement at § 1614.105 "does not carry the full weight of statutory authority" and is not a jurisdictional prerequisite for suit in federal court, we have consistently held that, absent waiver, estoppel, or equitable tolling, "failure to comply with this regulation [is] ... fatal to a federal employee's discrimination claim" in federal court.
> *Kraus v. Presidio Trust Facilities Div./Residential Mgmt. Branch,* 572 F.3d 1039, 1043 (9th Cir.2009) (alterations in the original) (quoting *Lyons v. England,* 307 F.3d 1092, 1105 (9th Cir.2002)).

[2] Shelley took the position that he timely initiated the EEO process on March 6, 2006, after he learned on or about February 17, 2006, that he had been denied an opportunity to interview for the permanent Chief of Contracting position. In his EEO complaint, Shelley asserted that he was discriminated against, between November 2005 and January 2006, based on his age. Shelley asserted that because of his age he was not given an interview, thereby eliminating his promotion opportunity. Shelley learned that he was not selected for the 120–day position on or about November 4, 2005. Thus, the time period Shelley specified in his EEO complaint encompasses the hiring process for both the 120–day and the permanent Chief of Contracting positions. Reading the EEO complaint liberally, as we must, *see Greenlaw v. Garrett,* 59 F.3d 994, 999 (9th Cir.1995), it is apparent that Shelley complained about both hiring decisions.

Further, the decisions were not discrete employment actions, but were part of a single, two-step, hiring process. The Corps sought to fill the position first on a temporary basis, followed by a permanent appointment after 120

days. It is obvious that the person selected for the temporary position would have a significant competitive advantage over the other applicants *606 for the permanent position, and therefore that the temporary appointment could be seen as a step towards the permanent appointment. Also, the limited nature of the hiring process for the temporary position, and the fact that the recruitment for the permanent position started less than a month after the temporary position was announced, could have led an applicant to view the processes as a continuum.

The interrelatedness of the two positions and of the hiring processes for them persuades us that the process for filling the Chief of Contracting position was a single course of conduct that began in 2005 with the selection of Marsh for the 120–day position and ended on April 16, 2006, when Marsh was confirmed as the new Chief of Contracting. Because Shelley filed his EEO complaint on March 6, seventeen days after he learned that he had not been selected to interview for the permanent position, he met the 45–day requirement of 29 C.F.R. § 1614.105(a).

Even if we assume that the two promotions were discrete employment actions, Shelley's complaint was still timely. "Incidents of discrimination not included in an EEOC charge may not be considered by a federal court unless the new claims are like or reasonably related to the allegations contained in the EEOC charge." *Green v. Los Angeles County Superintendent of Schools,* 883 F.2d 1472, 1476 (9th Cir.1989) (internal quotation marks omitted). In determining whether a new claim is like or reasonably related to allegations contained in the previous charge, the court inquires into "whether the original EEOC investigation would have encompassed the additional charges." *Id.* The same is true of a complaint of discrimination submitted to a federal agency's EEO office. *See Greenlaw,* 59 F.3d at 1000 (citing *Sosa v. Hiraoka,* 920 F.2d 1451, 1456–57 & n. 2 (9th Cir.1990)).

Here, the crux of Shelley's complaint is that he was bypassed for promotion to the permanent Chief of Contracting position because of his age. Because of the close relationship between the two positions and the temporally-overlapping hiring processes for them, an EEO investigation into the hiring process for the permanent position would necessarily have led to the investigation of the hiring process for the temporary position. The case is therefore distinguishable from *Williams v. Little Rock Municipal Water Works,* 21 F.3d 218 (8th Cir.1994), upon which the Corps relies. There, the Eighth Circuit affirmed partial summary judgment in favor of the defendant on the plaintiff's racial discrimination claim, finding that the plaintiff's EEOC complaint for retaliation included no mention of racial discrimination, and her allegations of racial discrimination submitted to the EEOC years earlier were not deemed reasonably related to her current claim for retaliation. *Id.* at 222–23.

In sum, Shelley's initial contact with the Corps' EEO officer seventeen days after he learned that he had been denied the opportunity to interview for the permanent Chief of Contracting position timely initiated his administrative claim based on being denied interviews and selection for the 120–day and the permanent positions, all of which occurred as part of the same course of conduct by the Corps. Shelley timely exhausted available administrative remedies.

II. Summary Judgment Disposition of Age Discrimination Claim

[3] Shelley's failure-to-promote claim is a claim of disparate treatment under the ADEA. The ADEA makes it unlawful for an employer to discriminate "because of [an] individual's age." 29 U.S.C. § 623(a)(1). The prohibition is "limited to individuals who are at least 40 years of *607 age." 29 U.S.C. § 631(a). The ADEA applies to protect federal employees and applicants for federal employment. 29 U.S.C. § 633a(a). To prevail on a claim for age discrimination under the ADEA, a plaintiff must prove at trial that age was the "but-for" cause of the employer's adverse action. *Gross,* 129 S.Ct. at 2350. "Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor." *Id.* at 2349.

This case, however, was resolved on summary judgment, and not on the merits. Prior to *Gross,* our circuit applied the burden-shifting evidentiary framework of *McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. 1817, to motions for summary judgment on ADEA claims. *See, e.g., Coleman v. Quaker Oats Co.,* 232 F.3d 1271, 1281 (9th Cir.2000); *Wallis v. J.R. Simplot Co.,* 26 F.3d 885, 889 (9th Cir.1994); *Rose v. Wells Fargo & Co.,* 902 F.2d 1417, 1420 (9th Cir.1990); *Steckl v. Motorola, Inc.,* 703 F.2d 392, 393 (9th Cir.1983). The district court declined to apply this framework, believing that *Gross* rejected it. The Corps argues to the same effect.

We disagree. In *Gross,* the Court grappled with whether a mixed-motives instruction may be given to the jury in an ADEA case.2 129 S.Ct. at 2348. Relying on the text of 29 U.S.C. § 623(a)(1) and case law allocating the burden of persuasion, the Court held that a plaintiff retains at all times the burden of persuasion to establish that age was the "but-for" cause of an employer's adverse action. *Id.* at 2352. Because *Gross* involved a case that had already progressed to trial, it did not address the evidentiary framework applicable to a motion for summary judgment. The Court, in fact, explicitly noted that it "has not definitively decided whether the evidentiary framework of *McDonnell Douglas* utilized in Title VII cases is

appropriate in the ADEA context." *Id.* at 2349 n. 2.
Since the decision in *Gross,* several sister circuits have continued to utilize the *McDonnell Douglas* framework to decide motions for summary judgment in ADEA cases. *See, e.g., Leibowitz v. Cornell Univ.,* 584 F.3d 487, 498 (2d Cir.2009); *Velez v. Thermo King de P.R., Inc.,* 585 F.3d 441, 446–47 (1st Cir.2009); *Connolly v. Pepsi Bottling Grp., LLC,* 347 Fed.Appx. 757, 759–61 (3d Cir.2009) (unpublished).3 We join them and hold that nothing in *Gross* overruled our cases utilizing this framework to decide summary judgment motions in ADEA cases. The *McDonnell Douglas* test is used on summary judgment, not at trial. *Costa v. Desert Palace, Inc.,* 299 F.3d 838, 855 (9th Cir.2002) ("This legal proof structure is a tool to assist plaintiffs at the summary judgment stage so that they may reach trial ... [I]t is not normally appropriate to introduce the *McDonnell Douglas* burden-shifting framework to the jury."). The *McDonnell Douglas* test shifts only the ***608** burden of production, after the plaintiff makes a prima facie case. *See, e.g., Tusing v. Des Moines Cmty. Sch. Dist.,* 639 F.3d 507, 515 n. 3 (8th Cir.2011) ("The *McDonnell Douglas* analysis is likely still an appropriate way to analyze ADEA 'pretext' claims, however, because *McDonnell Douglas* only shifts the burden of *production.*"); *Smith v. City of Allentown,* 589 F.3d 684, 691 (3d Cir.2009) ("*Gross* stands for the proposition that it is improper to shift the burden of persuasion to the defendant in an age discrimination case. *McDonnell Douglas,* however, imposes no shift in that particular burden."). "If plaintiffs establish a prima facie case, '[t]he burden of production, but not persuasion, then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged actions.' " *Hawn v. Exec. Jet Mgmt., Inc.,* 615 F.3d 1151, 1155 (9th Cir.2010) (quoting *Chuang v. Univ. of Cal. Davis, Bd. of Trs.,* 225 F.3d 1115, 1123–24 (9th Cir.2000)). "If defendant meets this burden, plaintiffs must then raise a triable issue of material fact as to whether the defendant's proffered reasons for their terminations are mere pretext for unlawful discrimination." *Id.* Because the continued use of *McDonnell Douglas* in summary judgment motions on ADEA claims is not inconsistent with *Gross,* we cannot overrule our prior precedent because of *Gross.*

Thus, to survive summary judgment on his claim for a violation of the ADEA under the disparate treatment theory of liability, Shelley must first establish a prima facie case of age discrimination. *Coleman,* 232 F.3d at 1280–81. If he is successful, the burden of production shifts to the Corps to articulate a legitimate non-discriminatory reason for its adverse employment action. *Id.* at 1281. It is then Shelley's task to demonstrate that there is a material genuine issue of fact as to whether the employer's purported reason is pretext for age discrimination. *Id.* At trial, he must carry the burden to prove that age was the "but-for" cause of his non-selection.

A. Prima Facie Case

A "prima facie case requires evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion." *O'Connor v. Consol. Coin Caterers Corp.,* 517 U.S. 308, 312, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996) (internal quotation marks omitted) (alterations in original).
[4] In a failure-to-promote case, a plaintiff may establish a prima facie case of discrimination in violation of the ADEA by producing evidence that he or she was (1) at least forty years old, (2) qualified for the position for which an application was submitted, (3) denied the position, and (4) the promotion was given to a substantially younger person. *See Steckl,* 703 F.2d at 393 (holding that the plaintiff established a prima facie case for age discrimination under the *McDonnell Douglas* framework because he "was clearly within the protected class, had applied for an available position for which he was qualified, and was denied a promotion which was given to a younger person"); *see also O'Connor,* 517 U.S. at 313, 116 S.Ct. 1307 ("Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class."); *Nidds v. Schindler Elevator Corp.,* 113 F.3d 912, 917 (9th Cir.1996) (finding that the requirements for a prima facie case of age discrimination were satisfied by evidence that the fifty-four year old plaintiff was discharged, he was performing ***609** his job satisfactorily, and his duties continued to be performed by a substantially younger employee, and holding that the district court "erred in concluding that to establish a prima facie case, [the plaintiff] was required to show that he was at least as qualified as his replacement").4

It is undisputed that Shelley was fifty-four at the relevant time, he was qualified for both the temporary and the permanent positions, he was denied both positions, and both went to a substantially younger candidate. Accordingly, Shelley has established a prima facie case of age discrimination.

B. Facial Legitimacy of the Corps' Explanation

The burden now shifts to the Corps to provide a non-discriminatory explanation for its hiring decisions. *Coleman,* 232 F.3d at 1281. The Corps did so here. In its brief on appeal, the Corps proffers as its

non-discriminatory explanation that Marsh was already employed as a GS–14 Supervisory Procurement Analyst, and hiring him caused a lateral move, whereas the position would have been a promotion for Shelley, who was serving at the GS–13 level. This is a facially legitimate explanation.

C. Pretext

The Corps' articulation of a legitimate non-discriminatory reason shifts the burden back to Shelley to raise a genuine factual question as to whether the proffered reason is pretextual. The plaintiff can prove pretext "(1) indirectly, by showing that the employer's proffered explanation is 'unworthy of credence' because it is internally inconsistent or otherwise not believable, or (2) directly, by showing that unlawful discrimination more likely motivated the employer." *Chuang,* 225 F.3d at 1124. All of the evidence—whether direct or indirect—is to be considered cumulatively. *Id.* We conclude that Shelley offered both direct and indirect evidence of pretext.

i. Direct Evidence

[5] Shelley presented direct evidence of age discrimination to rebut the Corps' purported non-discriminatory reason. Oberle testified that Scanlan and Brice inquired about the projected retirement dates for employees in the contracting divisions during the hiring period for the 120–day and permanent positions. A fact-finder could infer from this that they considered age and projected retirement relevant to the hiring decision. Despite the absence of names in the Capable Workforce Matrix, the format of the matrix permitted the identification of specific employees. The matrix contradicts Scanlan's testimony that individual age information was not provided in that format.5

The Corps contends that the matrix, at best, establishes that Scanlan and Brice knew Shelley's prospective retirement date, which, standing alone, would not support ***610** an inference of age discrimination. But the fact that Scanlan and Brice sought out the retirement dates at the time of their participation in the hiring process for the temporary and permanent positions shows more than that the decision-makers may have known of the candidates' ages. It raises an inference that they considered this information relevant to their decisions. Although Scanlan and Brice did not make the hiring decisions alone, evidence of their inquiry and of their influence over the process supports an inference that the Corps' proffered explanation for hiring Marsh was a pretext for age discrimination. *See Staub v. Proctor Hospital,* ——U.S. ——, 131 S.Ct. 1186, 1194, 179 L.Ed.2d 144 (2011) (under Uniformed Services Employment and Reemployment Rights Act, discriminatory motive imputed to employer where a supervisor performs an act motivated by discriminatory animus that is intended by the supervisor to cause an adverse employment action, and that act is a proximate cause of the ultimate employment action).

ii. Indirect Evidence

[6] [7] Evidence of a plaintiff's superior qualifications, standing alone, may be sufficient to prove pretext. *Raad v. Fairbanks North Star Borough School Dist.,* 323 F.3d 1185, 1194 (9th Cir.2003) (citing *Odima v. Westin Tucson Hotel,* 53 F.3d 1484, 1492 (9th Cir.1995)). A comparison of Shelley's and Marsh's resumes gives rise to a factual dispute as to whether Shelley was better qualified for the position than Marsh. Compared to Marsh, Shelley had significantly more years of work experience related to contracting, and more experience employed in the Corps. As of October 2005, Shelley had twenty-nine years of experience in contracting, whereas Marsh had twenty years. Unlike Marsh, Shelley spent most of his career in the Corps. Shelley had been an employee of the Corps for over nineteen years, Marsh for five and a half years.

Furthermore, Shelley was already employed in a Contracting Division, while Marsh was a Supervisory Procurement Analyst in a Business Management Division. Shelley had been employed as Assistant Chief in the Contracting Division under Oberle in Walla Walla for over a year, and before that for four years as a Team Leader in Walla Walla under Oberle. Contrary to the Corps' contention, Marsh served as Director of Contracting only "as requested." Shelley, too, served as Acting Chief of Contracting in his supervisor's absence. Although this fact was not included in his resume, Scanlan was aware of it, and testified that he had confidence in Shelley's performance as Acting Chief of Contracting. Shelley's resume identified more impressive and recent awards for on-the-job accomplishments than Marsh's.

Shelley's educational qualifications were superior to Marsh's. Shelley held an M.B.A., while Marsh had no graduate level degree. The selection criteria for the permanent position indicate that possession of a graduate level degree is a factor in ranking a candidate as outstanding for technical competency.

The selection criteria for the permanent position listed supervision of at least thirty employees as a factor to be considered in evaluating management skills. The Corps incorrectly asserts that Shelley's resume failed to indicate

that he acted as a supervisor. While Shelley's resume did not specify the number of employees he supervised, it did disclose that, as Assistant Chief of Contracting, he supervised, coordinated and managed the work of subordinate Team Leaders, who presumably led teams. Marsh relayed that he supervised fifteen employees in the position that he held at the time of his application. Although ***611** Marsh had supervised seventy-five employees on occasion when he served temporarily as Director of Contracting in Europe, it was not part of his regular job duties. Neither candidate clearly demonstrated that he met this criterion.

The Corps argues that, while Shelley's qualifications as described after the fact were extensive, he did not include all of his work experience and skills in his resume. On appeal, however, Shelley relies exclusively on information that was listed in his resume to argue that his qualifications for the position were superior. Even absent the additional information (e.g., the value of construction contracts he successfully shepherded), Shelley's resume demonstrated sufficient qualifications that a reasonable jury could find that he was substantially better qualified than Marsh. In addition, Scanlan testified that he had worked with Shelley for six years, and was familiar with Shelley's experience and credentials.

Further, that Shelley was a GS–13 employee, while Marsh was a GS–14, was relevant only as to the 120–day position. Had Shelley been given that position, he would have become a GS–14 and his move to the permanent position would have been lateral, like Marsh's.

None of the officials whose support for Marsh was cited in the email seeking approval for his hire for the 120–day position had reviewed the applicants' resumes. Only Butler reviewed the resumes. Viewed in the light most favorable to Shelley, Butler's testimony, read in conjunction with Oberle's testimony, could be understood to indicate that Butler initially favored Shelley for the position, but that she used an alleged negative reference from Oberle (which Oberle denies she ever gave) as a pretext for hiring Marsh after learning that Scanlan favored Marsh for the position. Scanlan, it bears repeating, represented to Butler, Rossi, Brice, Iverson and Bond that he had worked with Marsh in Germany. He testified, however, that he recommended Marsh based only on his reputation. Scanlan had met him at a social event, but had never worked with him. As noted, Scanlan had sought out information about employees' retirement eligibility at the time of the hiring process.

Accordingly, Shelley's rejection for the 120–day position could be found to be based on age discrimination. If it was, then the inference that the decision-makers were biased would carry over to their decision-making for the permanent position. Further, the denial of the temporary position was clearly a causative factor in the denial of the interview and selection for the permanent position. If the first decision was caused by discrimination, a strong inference is raised that the subsequent decisions were as well.

The Corps argues that age bias cannot be inferred in the selection for the permanent position, because other applicants close in age to Shelley were interviewed for that position and Shelley was not. Those applicants, however, were not selected for the position, and instead Marsh, the significantly younger applicant, was hired. Stacking the interview pool with older candidates does not immunize the decision to hire a younger one. Of the five panelists who selected the interviewees, Scanlan, Brice, and Rossi had all participated in the hiring decision for the 120–day position. Shelley received a top score from three of the five panelists. It was only the alteration of one unidentified panelist's score for Shelley from mid to bottom that cost Shelley an interview and disqualified him for the permanent position. The evidence of Scanlan's discriminatory animus discussed above supports an inference that Scanlan was biased against Shelley and in favor of Marsh based on ***612** age. The evidence of the workings of the hiring process supports an inference that Scanlan was able to influence the interview and selection decisions. Neither Shelley's non-selection for an interview for the permanent position, nor the interviews of other older applicants who were not selected for promotion, disproves Shelley's evidence supporting a prima facie case and pretext.

The evidence, viewed in the light most favorable to Shelley, is sufficient to allow a reasonable jury to find that the Corps' reliance on Marsh's GS–14 level, as compared to Shelley's GS–13 level, was pretextual in the light of Shelley's otherwise superior experience, education and recognition.

In sum, Shelley produced sufficient evidence to establish a prima facie case of age discrimination, and has responded to the Corps' alleged non-discriminatory reason for refusing to promote him by identifying evidence, both direct and indirect, showing that the Corps' explanation is pretextual.

CONCLUSION

Because Shelley initiated a timely administrative complaint and produced sufficient evidence in support of his ADEA claim, the district court's grant of summary judgment in the Corps' favor is reversed. The case is

remanded to the district court for further proceedings in accordance with this opinion.

REVERSED and **REMANDED.**

BYBEE, Circuit Judge, concurring in part and dissenting in part:

This should be a straightforward case. Plaintiff Devon Scott Shelley ("Shelley") claims he became a victim of age discrimination when the Army Corps of Engineers ("the Corps") denied him an opportunity to interview for a GS–14 position as Chief of the Contracting Division that ultimately went to a younger candidate. An unfiltered look at the facts reveals that of the six finalists the Corps interviewed, one candidate was *older* than Shelley, and two others were close to Shelley in age. The candidate the Corps ultimately hired, Vince Marsh, was already a GS–14 Supervisory Procurement Analyst, while Shelley was a GS–13 Assistant Chief.

On this record, there is no way Shelley can show that the Corps passed him over for an equally or less qualified candidate on account of his age. Rather, the record shows that 32 individuals applied for the position. A five-member selection committee, chaired by an army colonel and advised by an EEO officer, independently ranked the candidates on the basis of their resumes. Based on their individual evaluations of the candidates, the committee held a telephone conference and produced a list of the top six candidates. Shelley was not ranked among the top six, but was included in the second-tier group of nine candidates. The six finalists included three men and three women (one of whom was Shelley's own supervisor, Connie Oberle), and were born in 1950, 1952, 1955, 1959(2), and 1963; Shelley was born in 1951. The committee then jointly interviewed the finalists and unanimously recommended hiring Marsh. In its report, the committee found that Marsh had the "strongest interview.... [It] demonstrated [his] technical competency, professionalism, leadership and strategic thinking." The committee also found that Marsh had "the highest overall positive references." In the Corps's own investigation of Shelley's complaint, every member of the committee denied that age played any role in the committee's decision.

To this overwhelming evidence that age was not the reason the committee decided to hire Marsh and not Shelley, the majority simply points to two facts: (1) some ***613** members of the committee likely knew how old Shelley was, Maj. Op. at 610, and (2) Shelley believed he had more experience and, therefore, was better qualified than Marsh, Maj. Op. at 610–11. This doesn't come close to proving that the Corps "refuse[d] to hire [Shelley] ... *because of* such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added). And because the Age Discrimination in Employment Act ("ADEA") does not permit a mixed-motive theory, *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 129 S.Ct. 2343, 2350, 174 L.Ed.2d 119 (2009), Shelley has no case at all. I would affirm the district court's award of summary judgment, and I respectfully dissent.[1]

I

In *Gross,* the Supreme Court held that "under the plain language of the ADEA ... a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Id.* at 2350. This "but-for" test applies no matter whether the case was resolved on summary judgment or after a jury trial, and it does not permit the plaintiff to rely on a mixed-motive theory. *See id.*

Because Shelley has no direct evidence of discrimination based on age, he must rely on the burden-shifting approach articulated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The majority holds that *Gross* did not overrule our prior cases holding that the *McDonnell Douglas* framework applies to a disparate-treatment ADEA claim. Maj. Op. at 607–08. I concur in that part of the opinion. Although I think the *McDonnell Douglas* framework is going to be difficult to apply to an ADEA claim after *Gross*—and the Court was coy about whether *McDonnell Douglas* is compatible with *Gross,* 129 S.Ct. at 2349 n. 2—I agree that *Gross* does not clearly overrule our prior precedents. *See Smith v. City of Allentown,* 589 F.3d 684, 691 (3d Cir.2009) ("*Gross* does not conflict with our continued application of the *McDonnell Douglas* paradigm in age discrimination cases.").

Even if we continue to apply the *McDonnell Douglas* framework to the ADEA, Shelley still shoulders the ultimate burden of showing that the Corps's explanation—that Shelley was not as qualified as Marsh—was pretextual *and that the necessary reason Shelley was not hired was because of his age.* "To establish a disparate-treatment claim under the plain language of the ADEA ... a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision," *Gross,* 129 S.Ct. at 2350, because "the burden of persuasion [n]ever shifts to the party defending an alleged mix-motives discrimination claim brought under the ADEA," *id.* at 2348.

That is a heavy burden for Shelley to carry. And he doesn't come close on this record. The processes used by the Corps rule out impermissible bias, and the evidence relied on by the majority is insufficient to raise an issue of material fact.

II

The majority finds that "Shelley's rejection for the 120–day position could be found to be based on age discrimination." Maj. Op. at 611. It claims that Major Kelly Butler's and Connie Oberle's testimonies could show that "Butler initially ***614** favored Shelley for the position, but that she used an alleged negative reference from Oberle (which Oberle denies she ever gave) as a pretext for hiring Marsh after learning that Scanlan favored Marsh for the position." *Id.* at 611. I think the 120–day position is not really an issue.[2] In any event, this is simply not a reasonable inference. Although there is some dispute over whether or how Oberle conveyed a reference to Butler, whether she did offer a negative reference is beside the point (though she was going to be a candidate for the permanent position herself). It is not reasonable to infer that Butler would have chosen Shelley *but for* an alleged reference from Oberle. *See* Maj. Op. at 611. Butler did state in the Department of Defense Fact–Finding Conference of March 14, 2007 that "really, Connie's reference is why we did not choose Scott [Shelley]." Yet the Fact–Finding Conference at which she testified was not convened to consider Shelley's complaint, and, in context, her statement is not particularly probative. Moreover, in her deposition for this case she clarified her testimony, saying: "I didn't mean to indicate that I was ready to hire him and Connie Oberle said no. That's not the case.... Connie's reference is one of the reasons we did not choose Scott.... I did not mean to infer that she was the only reason that ... he wasn't chosen." She stated that she based her hiring decision on Marsh's being "the most qualified out of the nine" who applied.

Furthermore, it is unreasonable to infer that Butler changed her mind after input from Scanlan. She testified that she was the only one who reviewed the resumes for that position, and she made the decision in consultation with Colonel Michael Rossi, Commander for the Kansas City District, and Steve Iverson, Deputy District Engineer for Project Management for the Kansas City District. Although Scanlan may have been "a part of the process" and let Butler know that Marsh was his top pick, there is no indication that he was involved in the substance of the decision, and Shelley produced no evidence to contradict Butler's account of how the decision was made. A reasonable jury could not reasonably conclude from the evidence that discrimination was the but-for cause of Shelley failing to receive the 120–day position.

With regard to the permanent position, Shelley's biggest problem is that before he can make out a case that he did not get the *position* because of his age, Shelley has to show that he was passed over for an *interview* because of his age. This he cannot do. Of the six candidates who were actually selected for a final interview (from a list of 32), one was *older* than Shelley, one was only a year younger, and another was ***615** four years younger. The fact that the Corps considered qualified candidates older than (or about the same age as) Shelley without offering Shelley an interview is fatal to his claim. It is true that the fourth traditional element for establishing a prima facie case in failure to promote cases under the *McDonnell–Douglas* framework—that the employee be replaced by someone substantially younger, *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996)—is not a strict requirement. A plaintiff can produce more probative evidence of discrimination, or he can show that the decision to hire another member of the protected class (or in ADEA cases, a person of similar age) was a pretext to hide the discriminatory decision. *See Diaz v. Am. Tel. & Tel.*, 752 F.2d 1356, 1359–62 (9th Cir.1985) (Title VII); *see also Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207–08 & n. 2 (9th Cir.2008). While I deal with the former type of evidence below, there is no evidence of the latter grand conspiracy, that candidates of the same age as Shelley were given interviews to hide the already-made decision that Marsh would be given the position. Because age must be the but-for cause, *see Gross*, 129 S.Ct. at 2350, the fact that the committee ranked other similarly-aged applicants higher than Shelley suggests that even without any alleged age bias, he still would have not received the job because another similarly-aged applicant would have taken it instead.

Since the Corps interviewed similarly situated candidates, but not Shelley, the only plausible conclusion from this set of facts is that some reason other than age caused the selection committee to decide not to interview Shelley. And if the committee had some reason other than age—indeed, if it had *any* other reason—then Shelley cannot satisfy *Gross's* "but-for" test.

III

The majority finds that "Shelley presented direct evidence of age discrimination to rebut the Corps' purported non-discriminatory reason." Maj. Op. at 609. The majority is just wrong on all accounts.

First, the majority (as did Shelley) framed its theory of the case in terms of the *McDonnell Douglas* burden-shifting analysis. *See* Maj. Op. at 608. But that test is used when the plaintiff has to rely on inferences that are not based on direct evidence. As we have explained, "[w]hen a plaintiff

alleges disparate treatment based on direct evidence in an ADEA claim, we do not apply the burden-shifting analysis set forth in [*McDonnell Douglas*]." *Enlow v. Salem–Keizer Yellow Cab Co.,* 389 F.3d 802, 812 (9th Cir.2004). In *Enlow,* we were simply following the Supreme Court's instruction that "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination." *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985).

Second, even if we look at the majority's "direct evidence," it is anything but direct. As we explained in *Coghlan v. American Seafoods Co.:* "Direct evidence is evidence 'which, if believed, proves the fact [of discriminatory animus] without inference or presumption.' " 413 F.3d 1090, 1095 (9th Cir.2005) (alteration in original) (quoting *Godwin v. Hunt Wesson, Inc.,* 150 F.3d 1217, 1221 (9th Cir.1998)). It "typically consists of clearly sexist, racist, or similarly discriminatory statements or actions by the employer." *Id.; see also Enlow,* 389 F.3d at 812 ("Direct evidence, in the context of an ADEA claim, is defined as 'evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting ***616** the alleged discriminatory attitude ... sufficient to permit the *fact finder* to infer that that attitude was more likely than not a motivating factor in the employer's decision.' ") (quoting *Walton v. McDonnell Douglas Corp.,* 167 F.3d 423, 426 (8th Cir.1999) (internal quotation marks omitted)).

The majority's "direct evidence" is a single fact—that two members of the permanent position selection committee (Regional Contracting Chief Joseph Scanlan and Business Management Division Chief Kevin Brice) obtained a document called the "Capable Workforce Matrix" (the "matrix"), which lists projected vacancies in what appears to be the Walla Walla Contracting Division.3 Maj. Op. at 609. The matrix lists each of the positions in the division and, among other information, when the positions were expected to become vacant due to planned departures or retirements. The matrix does not mention the name of any member of the division, but one who is familiar with the division could deduce names based on the titles listed. For instance, the matrix indicates that the division currently employs one Assistant Chief of Contracting, and that the incumbent is scheduled to either leave or retire in fiscal year 2006. One who is familiar with the division would know that the Assistant Chief of Contracting is Shelley and would know, based on the matrix, that he is scheduled to either leave or retire from his position in the Walla Walla division in 2006. From this fact, the majority deduces "an *inference* that they considered this information relevant to their decision." Maj. Op. at 610 (emphasis added). But an inference, we have said quite clearly, is *not* direct evidence. *Coghlan,* 413 F.3d at 1095.

Moreover, even taking this evidence as circumstantial evidence, it doesn't amount to a hill of beans. There is no evidence in the record that Scanlan or Brice actually looked at the list, that either of them tried to link up Shelley's name to the list, or (even assuming that they did) that either took into account Shelley's age. In fact, the only evidence in the record is to the contrary. Scanlan testified that although he probably received the matrix, he did not recall seeing it; both testified that age was not a consideration. Nothing indicates that this request was anything out of the ordinary. Scanlan and Brice were entitled to these documents by virtue of their positions. Scanlan testified that "the matrix is a working document used for regional workforce planning purposes[, a]nd it is updated periodically for workforce planning purposes"; all of the districts, not just Walla Walla, were periodically to provide that information for use in projecting future requirements for different types of positions. So even if Scanlan or Brice had determined Shelley's retirement date from the matrix, that fact, without more, is irrelevant. And because Shelley's supervisor, Oberle, was on the same sheet and as readily identifiable as Shelley, there is no reason to think that they would not also deduce her age and discriminate against her—which they did not, because she received an interview.

Furthermore, as the majority concedes, all of the applicants had submitted resumes from which their ages could have been estimated, Maj. Op. at 603–04, and Scanlan had worked with Shelley for a number of years, so it would not be surprising if he knew Shelley's age. Indeed, the majority holds that Shelley has proved a prima facie case under *McDonnell Douglas,* ***617** which in the context of an ADEA claim means that Shelley has shown that "the promotion was given to a substantially younger person." Maj. Op. at 608. Thus, the majority began from the premise that everyone knew that Marsh was younger than Shelley. But aside from the bare fact of knowing Shelley's age, there are no statements by Scanlan or Brice, no emails, and no off-hand remarks to Shelley or others about Shelley's age. Yet "[w]ithout more, ... the fact that [Marsh] was younger than [Shelley] does not create a triable issue of pretext." *Pottenger v. Potlatch Corp.,* 329 F.3d 740, 748 (9th Cir.2003). If mere awareness of an applicant's age is direct evidence of discrimination sufficient to show pretext, no disappointed-applicant-turned-plaintiff need ever worry about summary judgment again. Indeed, even in cases in which employers have not only noticed but also commented in potentially negative ways about a plaintiff's age, we have found that this weak evidence is insufficient to justify a trial. *See id.* at 747 (compiling cases).

IV

The majority works very hard to come up with indirect evidence of pretext. Shelley may establish pretext "indirectly, by showing that the [Corps]'s proffered explanation is 'unworthy of credence' because it is internally inconsistent or otherwise not believable, or [ ] directly, by showing that unlawful discrimination more likely motivated the employer." *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1127 (9th Cir.2000) (quoting *Godwin,* 150 F.3d at 1220–22). Because Shelley has no direct evidence, the circumstantial evidence upon which he relies to refute the Corps's proffered explanation must be " 'specific' and 'substantial' to create a genuine issue of material fact." *Cornwell v. Electra Cent. Credit Union,* 439 F.3d 1018, 1029 (9th Cir.2006) (quoting *Godwin,* 150 F.3d at 1222). What the majority comes up with is strict scrutiny of Shelley's and Marsh's resumes and a conclusion that "Shelley's resume demonstrated sufficient qualifications that a reasonable jury could find that he was substantially better qualified than Marsh." Maj. Op. at 611.

The majority did not articulate the correct legal standard. While we have held that a "district court's finding that a Title VII plaintiff's qualifications were clearly superior to the qualifications of the applicant selected is a proper basis for a finding of discrimination," *Odima v. Westin Tucson Hotel,* 53 F.3d 1484, 1492 (9th Cir.1995), we have yet to articulate a precise standard in the summary judgment context. In *Raad v. Fairbanks N. Star Borough School Dist.,* 323 F.3d 1185 (9th Cir.2003), we declined to establish the high hurdle that the Fifth Circuit adopted in *Odom v. Frank,* 3 F.3d 839, 847 (5th Cir.1993) (requiring that the "disparities [be] so apparent as virtually to jump off the page and slap us in the face"). 323 F.3d at 1194. The Supreme Court also thought the standard in *Odom* was "unhelpful and imprecise," though it did not choose to give its own articulation of the correct standard. *Ash v. Tyson Foods, Inc.,* 546 U.S. 454, 457, 126 S.Ct. 1195, 163 L.Ed.2d 1053 (2006). Thus, we are left with the notion in *Raad* that a "pronounced difference" in qualifications can be enough, 323 F.3d at 1194, but without more guidance on what lesser quantum would also be sufficient.

Yet, surely situations in which the qualifications are so similar that they could easily be thought to be equal cannot justify a trial. More importantly, it cannot be that the standard is that a reasonable jury could find that one applicant is more qualified—however slightly—than another; we cannot ask the jurors which of two candidates they prefer. Rather, it must be that ***618** a reasonable jury could think that there is such a disparity in their qualifications that the choosing of Marsh over Shelley is only explainable because of the differences in their age. This is a higher threshold than the majority's new formulation. *See Ash,* 546 U.S. at 457, 126 S.Ct. 1195 ("Under this Court's decisions, qualifications evidence may suffice, at least in some circumstances, to show pretext."); *Cornwell,* 439 F.3d at 1033 ("[A] reasonable jury might also view the disparity between Cornwell's management experience and Hall's as proof that Defendants' explanation for Cornwell's demotion was a pretext for race discrimination."); *Raad,* 323 F.3d at 1197 ("[T]he fact that an employer hired a far less qualified person than the plaintiff naturally gives rise to an inference that the non-discriminatory explanation offered by the employer is pretextual.").[4]

Shelley cannot show that his qualifications were so clearly superior to Marsh's that a jury could reasonably find that Marsh was promoted over Shelley on account of age. In fact, it is far from clear that Shelley was even marginally better qualified than Marsh. Shelley relied on no evidence other than his own declaration and his resume. He offered no expert witnesses who could evaluate the very technical language of contracting and procurement hierarchy, he proffered no colleagues who thought that he was better qualified, and he couldn't point to any irregularities in the selection process. All we have is Shelley's own opinion of his relative qualifications. And because he has no other evidence to support his claim of age discrimination, Shelley rests his entire case on the theory that his qualifications are so vastly superior to Marsh's that there is no other explanation for the selection committee's decision other than the disparity in their ages. With all due respect, we have no business substituting our judgment for the selection committee. And our judgment does not improve by inviting jurors to decide which of the two they would have hired.

According to the selection criteria, the selection committee was supposed to evaluate resumes according to four criteria: (1) technical competency, (2) management, (3) leadership, and (4) teamwork. With regard to technical competency, the criteria required the committee to consider four factors: demonstrated knowledge of federal contracting regulations, experience in overseeing multimillion dollar contracts, knowledge and experience in applying federal regulations, and experience in developing contract strategies to support large acquisition programs. The selection criteria add that an outstanding candidate should possess a graduate level degree.

Shelley had two things going for him relative to Marsh. He had more experience—Shelley had 29 years of contracting experience, while Marsh had 21 years of experience—and Shelley possessed an MBA from Northwest Nazarene University. The MBA degree was a plus for Shelley, but the years of experience tell us nothing. Both candidates had at least 20 years of experience. We have no basis for deciding that Shelley's additional years made him a superior candidate; if so, then every employer must

promote on the basis of years of experience alone. But every employer knows that mere years in service is not a perfect proxy for competence. And indeed, if one were to rely on "experience" ***619** alone, Oberle would be an obvious choice over Shelley because she already had the very same position in Walla Walla as was being offered in Kansas City.

More importantly, the technical competency criterion called for the candidates to have "[e]xperience in overseeing multi-million dollar contracts." While Shelley's resume lists "supervis[ing]" and "coordinat[ing]" contracts as among his responsibilities, he failed to list any specifics or examples of the contracts that he managed. In his declaration prepared for this lawsuit, Shelley claimed that he had supervised "multi-million dollar military construction contracts" in Afghanistan, a $100,000,000 power house at Minidoka Dam for the Bureau of Reclamation, multi-million dollar dam projects in the Pacific Northwest, a $200,000,000 modernization project at McNary Dam, and other contracts exceeding $10,000,000 on the Columbia and Snake rivers. All of that is very impressive. Unfortunately, none of it was on Shelley's resume. For example, Shelley testified as to the projects he worked on in Afghanistan, for which he was awarded the Bronze Star.

> Q. Are those—are those examples listed in your resume?
>
> A. They're referenced in my Bronze Star award. Not the contracts specifically.
>
> Q. But if I look at the passage on the Bronze Star award will I see any reference to those specific projects?
>
> A. I don't think so.
>
> Q. Should the panel have considered those projects when they were looking at your resume?
>
> A. Yes.
>
> Q. And they have done that by finding it out from something other than your resume?
>
> A. Yes.

He didn't fare any better on the other projects he claimed in his declaration. Here is the testimony on the Minidoka Dam project:

> Q. Is that example listed anywhere in your resume?
>
> ....
>
> A. No.

He was asked about his experience with the dams in the Pacific Northwest:

> Q. Where in your resume does it mention ... the complex earth dams throughout the Pacific Northwest? Or the Grand Coulee Dam?
>
> A. I don't list them specifically.

His Walla Walla experience didn't show up either:

> Q. Where is that in your resume?
>
> A. It's not specifically stated, but it's implied with my unlimited warrant in my resume.

By contrast, Marsh's resume specifies that he "[s]erved as the Contract Administrator for the $1.3 billion Health Care Delivery and Administrative Support Services contract." The majority's answer for Shelley's failings in this regard is to explain that Scanlan, who served on the selection committee, was already personally "familiar with Shelley's experience and credentials." Maj. Op. at 611. But we have no idea whether Scanlan knew all the details Shelley omitted, and suggesting that one member of the selection committee "knows your record" is not the same thing as submitting a complete application to the committee. The decision not to interview Shelley was not up to Scanlan alone—it was up to a five-member selection committee, of which Scanlan was just one member. As Colonel Rossi, who chaired the selection committee, explained, each member of the selection committee independently reviewed resumes from dozens of applicants before convening via teleconference ***620** to decide on who to interview. Given the structure of the application process, Shelley should not have expected Scanlan to fill in the blanks in his resume if he failed to submit a complete resume in the first place; it is unreasonable for him to expect the remaining members of the committee to rank him based on information he didn't supply. In sum, though Shelley claimed to have had experience managing large contracts, there is no way to tell based on his resume, which offers only general descriptions of his past experience.

With respect to management and leadership, the selection criteria emphasize experience serving as branch or section supervisor with over 30 employees, managing "large, multidisciplined" organizations and overseeing the execution of multi-million dollar contracts. Here, the differences between the candidates' resumes really show. At the time he applied, Shelley was Assistant Chief in the Contracting Division, a GS–13 position. He previously had positions as a Team Leader, Supervisory Contract

Specialist, and Contract Specialist. Although the criteria specifically mentioned that the candidates should be "branch or section supervisor ... with over 30 employees," Shelley did not list the number of employees he supervised in any of his positions. By contrast, Marsh was a Supervisory Procurement Analyst, which was a GS–14 position, and he stated that he supervised 15 employees. In his previous position as Supervisory Contract Specialist, he had supervised 75 contract specialists, including 14 contracting officers. And prior to that he had supervised 13 German and American contract specialists and three contracting officers in Germany.

The majority recognizes that Shelley didn't respond directly to the criteria, but props him up anyway: "While Shelley's resume did not specify the number of employees he supervised, it did disclose that, as Assistant Chief of Contracting, he supervised, coordinated and managed the work of subordinate Team Leaders, *who presumably led teams.*" Maj. Op. at 619–20 (emphasis added). Unfortunately, it is a big presumption. Shelley stated that, around 1985, he was temporarily made the Chief of the Walla Walla Division. Here is his testimony:

> A. How long have you served as a Division Chief, how many days?
>
> Q. I can't even number them on my head.... I was constantly made the Division Chief.
>
> ....
>
> Q. Is that noted on your resume?
>
> ....
>
> A. I don't see that I covered that in there.... They wouldn't have seen it from my resume.
>
> ....
>
> Q. So is there anywhere in your resume where it reflects that you acted as a Division Chief for any significant period of time?
>
> A. I don't see it in there.

To counteract the failings in Shelley's resume, the majority then disparages Marsh's resume because his supervising 75 employees was not part of his regular job duties. *See* Maj. Op. at 610. From all of this, the majority calls the round a tie because "[n]either candidate clearly demonstrated that he met this criterion." *Id.* at 610.

The majority is wrong, of course. The most notable distinction between the two resumes was that Shelley was not the head of his office and Marsh was. That inconvenient fact is also reflected in one other critical fact: Marsh's demonstrated competence had been rewarded with a GS–14 position, while Shelley was still a GS–13. The majority's answer to this is incomprehensible. It says that this was "relevant ***621** only as to the 120–day position" because, if Shelley had been given the 120–day position, he too would have been a GS–14. *Id.* at 611. The majority has missed the whole point: Marsh was already a GS–14 when the 120–day position opened; even though he was younger than Shelley and had fewer years with the Corps, he held a higher position, at least as measured by his supervisory responsibilities and his pay grade. *See Pottenger,* 329 F.3d at 748 ("Nor does the fact that the company moved a younger employee ahead of Pottenger on the CEO successor list suggest that [the company] acted with any discriminatory motive, for that employee had held a higher position in the company than Pottenger.").

With regard to the final criterion, teamwork, the criteria emphasize the ability to work with customers and other departments, offices, and teams in a multi-disciplinary setting. Marsh's resume lists relevant experience such as serving as his directorate's point of contact with Congress and the Army Audit Agency, in addition to maintaining working relationships with counterparts throughout the Department of Defense, U.S. Small Business Administration, and other federal agencies. Shelley's resume, on the other hand, fails to list any comparable experience. The majority opinion is just silent on this criterion.

From all of this, the majority deduces that "a reasonable jury could find that [Shelley] was *substantially better qualified* than Marsh." Maj. Op. at 611 (emphasis added). The majority thus sides with Shelley, who bitterly claims that "Marsh should have received a 'minimally acceptable' evaluation." But repeating it does not make it so. At the very least, Marsh had a resume equal to or better than Shelley's. And these were not the only two candidates. The selection committee was responsible for ranking 32 applicants, among whom were a number of qualified individuals, including Shelley's supervisor. Based on the relevant resume screening criteria, along with the fact that Marsh was already a Supervisory Procurement Analyst, there is no evidence to show that Shelley was "substantially better qualified" than Marsh. And without that evidence, Shelley has nothing to show that the Corps's explanation—that the selection committee thought there were six candidates better qualified than Shelley—was pretextual.[5]

Indeed, the majority overlooks a straightforward conclusion based on evidence that it discusses. In the panel members' initial rankings—which were done individually and prior to any discussion with other panel

members—Marsh received four top rankings and one mid ranking; Shelley received three top rankings and two mid rankings. Even assuming that Scanlan was the one who gave Marsh a top ranking and Shelley a mid ranking, that means that the other panel members independently came to the conclusion that Marsh was at least as qualified as Shelley. Furthermore, a different panel member changed his score for Shelley (downgrading him from mid to bottom). Even if this change came after the panel members' discussion—in which the evidence only shows that age was never discussed and neither was Shelley in particular—that means that at least *two* panel members concluded that Marsh was a better ***622** applicant than Shelley. Thus, even if Scanlan did have animosity toward Shelley based on his age (for which there is no evidence whatsoever), Marsh would still have been strongly preferred over Shelley by the committee as a whole.

There is more than sufficient evidence to affirm the district court's grant of summary judgment, even without considering the *Gross* "but-for" test. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1285 (9th Cir.2000) (holding that comments related to age, the plaintiff's own evaluations of his qualifications, and the use of subjective evaluations for promotion were still insufficient to raise an issue of fact concerning discriminatory motive). Once we factor *Gross* into the mix, it is apparent that Shelley cannot show that the Corps's decision is unexplainable on any basis other than age discrimination.

* * * * * *

There is not only no evidence of age discrimination *against* Shelley, there is no evidence of age discrimination in *favor* of Marsh. On this record, Shelley has failed to satisfy even his minimal burden of showing that his age "actually played a role in [the Corps's decision-making] process and had a determinative influence on the outcome," *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993)), much less advance any evidence of "but for" causation for his ADEA claim. Accordingly, I would affirm the grant of summary judgment.

Parallel Citations

114 Fair Empl.Prac.Cas. (BNA) 303, 95 Empl. Prac. Dec. P 44,392, 12 Cal. Daily Op. Serv. 536, 2012 Daily Journal D.A.R. 14

Footnotes

* The Honorable Claudia Wilken, United States District Judge for the Northern District of California, sitting by designation.

1 As an alternative to filing an administrative complaint, a federal employee may file a civil action in a United States district court under the ADEA after giving the EEOC not less than thirty days' notice of intent to sue. 29 U.S.C. § 633a(d); 29 C.F.R. § 1614.201(a); *see Bankston*, 345 F.3d at 770. There is no evidence that Shelley provided the EEOC with notice of his intent to sue the Corps, and he does not appear to rely on this alternative avenue.

2 Mixed-motives jury instructions are used in Title VII cases where an employee alleges that he or she suffered an adverse employment action because of both permissible and impermissible considerations, i.e., a "mixed-motives" case. *Gross*, 129 S.Ct. at 2347 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989)). Under such instructions, if a Title VII plaintiff shows that discrimination was a "motivating" or a "substantial" factor in the employer's action, the burden of persuasion would shift to the employer to show that it would have taken the same action regardless of that impermissible consideration. *Id.*

3 We have done the same in non-precedential, unpublished decisions. *Russell v. Mountain Park Health Ctr. Props., LLC*, 403 Fed.Appx. 195, 196 (9th Cir.2010); *EEOC v. Banner Health*, 402 Fed.Appx. 289, 290–92 (9th Cir.2010).

4 It thus appears that, as part of the prima facie case, a plaintiff does not have to show that he was discriminated against in favor of a substantially younger employee with equal or inferior qualifications. If Shelley were required to show this, he has done so, as discussed below in connection with his showing of pretext. *See Lowe v. City of Monrovia*, 775 F.2d 998, 1005 (9th Cir.1985), as amended, 784 F.2d 1407 (9th Cir.1986) (holding that in order to show pretext, a plaintiff may rely on the same evidence that he offered to establish a prima facie case).

5 Although the Walla Walla Capable Workforce Matrix in the record is dated March 21, 2006, after Shelley was denied an opportunity to interview, it displays the same information that Scanlan and Brice had requested earlier, and shows that one could deduce the names of individual employees.

1 Because I agree that Shelley exhausted his administrative remedies, I concur in Part I of the majority opinion. I also agree that the district court erred in holding that the *McDonnell Douglas* framework does not apply to ADEA claims. Accordingly, I concur in Parts I through II.A of the majority opinion.

2 The majority mischaracterizes the Corps's explanation for its decisions as being that Marsh was already a GS–14 whereas Shelley was only a GS–13. Maj. Op. at 609. As I discuss in Part IV, Marsh's prior *permanent* GS–14 position is of course relevant and demonstrates his superior qualifications, though it is hardly the only way in which he was a better applicant than Shelley. The Corps has contended throughout that the six candidates selected for an interview were each generally better qualified than Shelley and that the selection process worked correctly; even Shelley acknowledged this as the explanation offered by the Corps. Because of this mischaracterization, the majority can claim that the Corps's explanation was irrelevant for the permanent hiring decision because if Shelley had received the temporary position, his receiving the permanent position would have been a lateral move, too. *See* Maj. Op. at 611. It also paves the way for the majority's erroneous conclusion that a "reasonable jury [could] find that the Corps' reliance on Marsh's GS–14 level, as compared to Shelley's GS–13 level, was pretextual." Maj. Op. at 611.

3 For the reasons set out above, this piece of evidence is irrelevant to the 120–day position and only potentially probative for discrimination in the selection for the permanent position.

4 I note that in these cases the standard of proof is not as demanding as in this ADEA case. Because these cases were brought under Title VII and similar causes of action, demonstrating mixed motives would have been sufficient in each; the plaintiffs did not need to prove but-for causation. *See, e.g., Desert Palace, Inc. v. Costa,* 539 U.S. 90, 94, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003).

5 It should also be noted that, for the same reasons that Marsh demonstrated better qualifications for the permanent position, he also demonstrated better qualifications for the 120–day position. In any case, Marsh already held the same job title as the 120–day position. Thus, for neither position can Shelley rebut the Corps's legitimate, nondiscriminatory justification.

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934 F.2d 1104
United States Court of Appeals, Ninth Circuit.

Edyna Marie SISCHO-NOWNEJAD, Plaintiff-Appellant,
v.
MERCED COMMUNITY COLLEGE DISTRICT; Board of Trustees of Merced Community College District; Bruce Pressly; Margaret Randolph; Richard Rodini; Robert Ohki; Richard Parker; Dr. E.W. Bizzini; James Edmonson; Walter Crawford; Anthony Rose; William C. Martineson; Dean Ron Williams; Luc Janssens; Alan Beymer, in their official capacity as members of the Board of Trustees and Administrators of Merced Community College District, Defendants-Appellees.

No. 89-15874. | Argued and Submitted Dec. 10, 1990. | Decided June 13, 1991.

Art instructor at community college brought action against college and college officials alleging age and sex discrimination. The United States District Court for the Eastern District of California, Robert E. Coyle, Chief Judge, entered summary judgment in favor of college and college officials, and instructor appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) instructor established prima facie case of age and sex discrimination; (2) genuine issues of material fact existed as to whether legitimate, nondiscriminatory reasons offered for disparate treatment were pretext for discrimination; (3) triable issues existed with respect to § 1983 claim; and (4) instructor did not have claim under California Fair Employment and Housing Act for failure reasonably to accommodate her handicap of high blood pressure.

Affirmed in part; reversed in part; and remanded.

West Headnotes (14)

[1] Civil Rights
⇐Particular cases
Civil Rights
⇐Practices prohibited or required in general; elements

Employee may show violations of Title VII or the Age Discrimination in Employment Act by proving disparate treatment or disparate impact, or by proving existence of hostile work environment. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
58 Cases that cite this headnote

[2] Civil Rights
⇐Disparate treatment

In order to prove disparate treatment, employment discrimination plaintiff may assert either that employer's challenged decisions stemmed from single illegitimate motive or that decision was product of both legitimate and illegitimate motives. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
16 Cases that cite this headnote

[3] Civil Rights
⇐Effect of prima facie case; shifting burden

Employment discrimination plaintiff may establish prima facie case by introducing evidence that gives rise to inference of unlawful discrimination, in which case burden shifts to employee to articulate legitimate, nondiscriminatory reason for challenged actions; if employer does so, then burden returns to plaintiff to prove that articulated reason is pretextual, with question ultimately being whether it is more likely than not that employer's conduct was motivated solely by intentional discrimination. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
94 Cases that cite this headnote

[4] **Civil Rights**
Motive or intent; pretext

In mixed motive case, employment discrimination plaintiff must show that it is more likely than not that protected characteristic played motivating part in employment decision; once that is done, employer may escape liability only by proving by way of affirmative defense that employment decision would have been same even if characteristic had played no role. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
25 Cases that cite this headnote

[5] **Federal Civil Procedure**
Burden of proof

Employment discrimination plaintiff's burden on summary judgment was merely to establish prima facie case and, once employer articulated legitimate, nondiscriminatory reason for its actions, to raise genuine factual issue as to whether articulated reason was pretextual. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
51 Cases that cite this headnote

[6] **Civil Rights**
Presumptions, Inferences, and Burden of Proof
Civil Rights
Prima facie case

Evidence giving rise to inference of unlawful discrimination may be either direct or circumstantial, and amount that must be produced in order to create prima facie case is very little. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
56 Cases that cite this headnote

[7] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Normally when evidence giving rise to inference of unlawful discrimination has been introduced, court should not grant summary judgment to defendant in employment discrimination action on any ground relating to merits, even if defendant articulates legitimate, nondiscriminatory reason for challenged employment decision; specifically, in evaluating whether defendant's articulated reason is pretextual, trier of fact must, at minimum, consider same evidence that plaintiff introduced to establish her prima facie case. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
76 Cases that cite this headnote

[8] **Civil Rights**
Practices prohibited or required in general; elements
Civil Rights
Practices prohibited or required in general; elements

Same standards exist under Title VII and the Age Discrimination in Employment Act for proving discrimination in conditions of employment as exist for proving discrimination in hiring. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[9] **Civil Rights**
Sex discrimination
Civil Rights
Age discrimination

Art instructor at community college introduced

sufficient evidence to give rise to inference of disparate treatment on basis of age and sex, where instructor was only female and one of oldest full-time faculty members in art department, and she introduced evidence she was subjected to treatment that differed from that accorded remainder of faculty, and that her superiors referred to her as "an old warhorse" and to her students as "little old ladies," and made other derogatory remarks indicating age and gender bias. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
18 Cases that cite this headnote

[10] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Genuine issues of material fact existed as to whether legitimate, nondiscriminatory reasons offered for disparate treatment of art instructor at community college were pretext for discrimination on basis of age and sex, precluding summary judgment on instructor's claims under Title VII and the Age Discrimination in Employment Act, considering extent of disparate treatment evidence presented by instructor beyond that necessary to establish prima facie case. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
53 Cases that cite this headnote

[11] **Civil Rights**
Education, employment in
Civil Rights
Education, employment in

Allegation that community college and employees thereof violated art instructor's rights to equal protection of the laws by discriminating against her on basis of age and gender was claim cognizable under § 1983. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 14.

11 Cases that cite this headnote

[12] **Civil Rights**
Discrimination in General

Plaintiff must demonstrate that defendants acted with intent to discriminate to prove discrimination in violation of § 1983. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 14.

26 Cases that cite this headnote

[13] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Evidence that was determined to be sufficient to create genuine issue of material fact as to intentional discrimination for purposes of Title VII and the Age Discrimination in Employment Act also served to create genuine issue of material fact for purposes of discrimination claim under § 1983. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 14.

19 Cases that cite this headnote

[14] **Civil Rights**
Requesting and choosing accommodations; interactive process; cooperation

Community college and its employees did not violate art instructor's rights under California Fair Employment and Housing Act by failing reasonably to accommodate her handicap of high blood pressure by granting her leave of absence, where instructor made no request for medical leave and, in fact, informed employees when she requested leave that she was under no medical restrictions. West's Ann.Cal.Gov.Code § 12900 et seq.
1 Cases that cite this headnote

Attorneys and Law Firms

*1106 Katherine Hart, Fresno, Cal., for plaintiff-appellant.

Benjamin L. Ratliff, Eldridge, Anderson & Weakley, Fresno, Cal., for defendants-appellees.

Appeal from the United States District Court for the Eastern District of California.

Before TANG, FLETCHER and REINHARDT, Circuit Judges.

Opinion

REINHARDT, Circuit Judge:

Edyna Sischo-Nownejad, an art instructor at Merced Community College on Merced campus, brought suit against the college and college officials alleging age and sex discrimination. Her complaint alleges that because of her age and sex, the defendants harassed her and subjected her to different treatment regarding class assignments and other working conditions. During the period in question, Sischo-Nownejad was 52-58 years of age. At the time, she was the only female, and one of the oldest, full-time faculty members in the art department.

The district court granted summary judgment for the defendants. The court held that Sischo-Nownejad had failed to *1107 prove a *prima facie* case of intentional discrimination pursuant to Title VII, the Age Discrimination in Employment Act, and 42 U.S.C. § 1983, and that no triable issue of material fact existed regarding her second § 1983 claim and her related state law claims. Sischo-Nownejad appeals from the grant of summary judgment.[1] We affirm in part and reverse in part.

I. FACTS[2]

Sischo-Nownejad has been employed as a faculty member in the Merced College art department since 1968. The college ordinarily bases the assignment and scheduling of classes on the input of faculty members, and senior faculty who have developed particular courses are normally given the first choice of teaching them. Further, division chairpersons customarily consult with faculty members regarding their need for supplies. The college followed these practices with regard to the other faculty members throughout the period in question, but did not do so with regard to Sischo-Nownejad. Instead, from 1981 to 1986, division chairpersons failed to consult with her about which courses she wanted to teach, gave her teaching assignments that she did not want, and reassigned courses that she had developed and taught for many years. From 1982 to 1988, they also failed to consult with her regarding her need for supplies and-although the other faculty members received all the supplies necessary-she received none. Moreover, from 1981 to 1983, the division chairpersons monitored the enrollment of her classes but not the enrollment of classes taught by others.

In March 1981, Sischo-Nownejad protested to defendant Williams, a college dean, regarding her class assignments. She stated that defendant Janssens, her division chairperson, had reassigned some of her high-enrollment courses to himself, regardless of the fact that she had developed the classes. Williams took no action. Sischo-Nownejad then wrote to Williams and sent a copy of the letter to the president of the college and the board of trustees. Janssens responded by filing a complaint with the faculty ethics committee that accused Sischo-Nownejad of charging him with unprofessional conduct in a widely disseminated letter, violating department procedure by the copying and sale of art department works, and physically abusing another art department teacher. He did not send Sischo-Nownejad a copy of the complaint. The ethics committee then violated its own policies by conducting an investigation that involved the entire faculty senate, rather than merely the ethics committee, with no advance notice to Sischo-Nownejad. Janssens's complaint resulted in an admonishment against Sischo-Nownejad, which was included in her personnel file.

In 1982, Sischo-Nownejad took a leave of absence for medical reasons. When she returned to work, she found that large file cabinets had been moved into her office during her absence. College officials criticized her for allowing her daughter to use her faculty parking space and said that if the use continued, the space would be taken away. Sischo-Nownejad responded that she was on crutches and that her daughter was providing transportation; the defendants took no further action regarding the parking space. The defendants also criticized Sischo-Nownejad for not being on campus enough hours to fulfill her contractual obligation, for failing to attend division meetings, and for being absent during her office hours. Sischo-Nownejad denied the allegations.

In February 1983, Sischo-Nownejad submitted a written request for a leave of absence. The defendants denied her request, stating that the semester had already progressed too far to grant the leave. Sischo-Nownejad sought reconsideration *1108 and defendant Martineson,

president of the college, asked for clarification on the type of leave requested. After soliciting information on the types of leave available, Sischo-Nownejad requested a paid sabbatical leave or an unpaid professional development leave. The letter that her attorney wrote to Martineson requesting the leave stated that Sischo-Nownejad was under no medical restrictions and that, unless advised to the contrary by her doctors, she would continue to fulfill her contractual obligations. Martineson did not rule on the request for reconsideration, and Sischo-Nownejad withdrew the request seven months later.

Throughout the period in question, the defendants made numerous statements indicating age and gender bias. These statements include a reference to Sischo-Nownejad as "an old warhorse" and a characterization of her students as "little old ladies [who] have their own art studio." Janssens once stated, "There she is with her little group of women." He also made sarcastic remarks regarding "you women's libbers." Martineson twice urged Sischo-Nownejad to retire, a suggestion repeated by the dean of personnel.

II. PROCEDURAL HISTORY

Sischo-Nownejad's complaint contains several claims for relief. She alleges that the defendants discriminated against her on the basis of sex, in violation of Title VII of the Civil Rights Act; that they discriminated against her on the basis of age, in violation of the Age Discrimination in Employment Act; and that they deprived her of equal protection and the right to privacy, in violation of 42 U.S.C. § 1983. She further alleges that the defendants deprived her of equal protection in violation of Article I, § 7 of the California Constitution. She claims that their alleged age and sex discrimination constitutes a violation of the California Fair Employment and Housing Act, as does their alleged refusal reasonably to accommodate her handicap of high blood pressure by granting her a leave of absence. Finally, she alleges that the defendants breached an implied covenant of good faith and fair dealing in her employment contract.

The district court granted the defendants' motion for summary judgment on all claims. The court held that Sischo-Nownejad had failed to establish a *prima facie* case of intentional age or sex discrimination pursuant to Title VII, the Age Discrimination in Employment Act, and § 1983. It further held that no triable issue of material fact existed pursuant to § 1983 on the question whether the defendants had violated Sischo-Nownejad's right to privacy.[3] Because of its holding that Sischo-Nownejad had failed to demonstrate age or sex discrimination pursuant to Title VII and the Age Discrimination in Employment Act, the district court also held that she had failed to demonstrate age or sex discrimination pursuant to Article I, § 7 of the California Constitution[4] and the California Fair Employment and Housing Act. The court held that no triable issue of material fact existed pursuant to the Fair Employment and Housing Act on the question whether the defendants had failed reasonably to accommodate Sischo-Nownejad's high blood pressure by granting a leave of absence. Finally, the court held that Sischo-Nownejad could not recover for breach of an implied covenant of good faith and fair dealing because California law limits the application of tort damages in employment situations.[5]

The district court denied the defendants' request for attorney's fees pursuant to 42 U.S.C. § 1988. The defendants do not appeal this ruling. They do, however, request that we exercise our discretion and ***1109** award them their costs and attorney's fees on appeal.

III. TITLE VII AND AGE DISCRIMINATION IN EMPLOYMENT ACT CLAIMS

A.

[1] Title VII of the Civil Rights Act makes it illegal for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex." 42 U.S.C. § 2000e-2(a)(1). The Age Discrimination in Employment Act forbids the identical conduct when the discrimination is "because of such individual's age." 29 U.S.C. § 623(a)(1). A plaintiff may show violations of these statutes by proving disparate treatment or disparate impact, or by proving the existence of a hostile work environment. *See International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977); *Jordan v. Clark,* 847 F.2d 1368, 1373 (9th Cir.1988), *cert. denied,* 488 U.S. 1006, 109 S.Ct. 786, 102 L.Ed.2d 778 (1989); *Equal Employment Opportunity Commission v. Borden's, Inc.,* 724 F.2d 1390, 1392 (9th Cir.1984). Disparate treatment involves intentional discrimination. *Borden's,* 724 F.2d at 1392. Disparate impact involves a facially neutral employment criterion that has an unequal effect on members of a protected class; discriminatory intent need not be proved. *Id.* at 1392-93. A hostile work environment requires the existence of severe or pervasive and unwelcome verbal or physical harassment because of a

plaintiff's membership in a protected class. *See Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 66-67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986); *Young v. Will County Dep't of Public Aid,* 882 F.2d 290, 294 (7th Cir.1989); *Jordan,* 847 F.2d at 1373.

[2] [3] [4] Sischo-Nownejad's claims are based exclusively on a theory of disparate treatment.6 In order to prove disparate treatment, a plaintiff may assert either that the employer's challenged decision stemmed from a single illegitimate motive (i.e., sex discrimination) or that the decision was the product of both legitimate and illegitimate motives. *Price Waterhouse v. Hopkins,* 490 U.S. 228, 244-48, 109 S.Ct. 1775, 1788-89, 104 L.Ed.2d 268 (1989). In the former case, the plaintiff may establish a *prima facie* case by introducing evidence that "give[s] rise to an inference of unlawful discrimination." *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981).7 The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the challenged action. *Id.* If the employer does so, then the burden returns to the plaintiff to prove that the articulated reason is pretextual. *Id.; McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 804, 93 S.Ct. 1817, 1825, 36 L.Ed.2d 668 (1973). Ultimately, the question is whether it is more likely than not that the employer's conduct was motivated solely by intentional discrimination. *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983). In other words, does the preponderance of the evidence tend to support the conclusion that ***1110** the action resulted from a discriminatory motive? The analysis in a case involving mixed motives is somewhat different. The *Price Waterhouse* plurality found the *Burdine* formula unsuitable for mixed motives cases. *Price Waterhouse,* 490 U.S. at 244-48, 109 S.Ct. at 1788-89. Instead, it adopted a simpler approach. Under *Price Waterhouse,* the plaintiff must show that it is more likely than not that a protected characteristic "played a motivating part in [the] employment decision." *Id.* at 244, 247 n. 12, 109 S.Ct. at 1787, 1789 n. 12. Once that is done, the employer may escape liability only by proving by way of an affirmative defense that the employment decision would have been the same even if the characteristic had played no role. *Id.* at 243-47, 109 S.Ct. at 1787-88.

[5] In opposing the summary judgment motion, Sischo-Nownejad relied on a single-motive theory.8 Because her complaint survives summary judgment on that theory, we need not decide here whether a mixed motives theory would be applicable as well.9 Sischo-Nownejad's burden on summary judgment was merely to establish a *prima facie* case and, once the employer articulated a legitimate, nondiscriminatory reason for its actions, to raise a genuine factual issue as to whether the articulated reason was pretextual. *See Lowe v. City of Monrovia,* 775 F.2d 998, 1008 (9th Cir.1985), *as amended,* 784 F.2d 1407 (1986).10 Because she met that burden, we hold that the district court committed reversible error in granting summary judgment to the defendants on her claims under Title VII and the Age Discrimination in Employment Act.

B.

[6] [7] In order to show a *prima facie* case of discrimination, "a plaintiff must offer evidence that 'give[s] rise to an inference of unlawful discrimination.' " *Id.* at 1005 (quoting *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981)). The evidence may be either direct or circumstantial, ***1111** and the amount that must be produced in order to create a *prima facie* case is "very little." *Id.* at 1009. Normally, when such evidence has been introduced, a court should not grant summary judgment to the defendant on any ground relating to the merits. *Id.* Even if the defendant articulates a legitimate, nondiscriminatory reason for the challenged employment decision, thus shifting the burden to the plaintiff to prove that the articulated reason is pretextual, summary judgment is normally inappropriate. "[W]hen a plaintiff has established a *prima facie* inference of disparate treatment through direct or circumstantial evidence of discriminatory intent, he will *necessarily* have raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer's articulated reason for its employment decision." *Id.* (emphasis added). Specifically, in evaluating whether the defendant's articulated reason is pretextual, the trier of fact must, at a minimum, consider the same evidence that the plaintiff introduced to establish her *prima facie* case. *Id.* at 1008. When that evidence, direct or circumstantial, consists of more than the *McDonnell Douglas* presumption, a factual question will almost always exist with respect to any claim of a nondiscriminatory reason. The existence of this question of material fact will ordinarily preclude the granting of summary judgment. *Id.* at 1009.

In *Lowe v. City of Monrovia,* we reversed a grant of summary judgment on facts similar to those before us today. In that case, a black female plaintiff applied for a job with Monrovia's police force. The city's personnel manager told her that the city had no women or black police officers and "had no facilities." The personnel manager suggested that the plaintiff apply in Los Angeles instead of Monrovia. *Lowe,* 775 F.2d at 1002. We held

that these statements, when viewed in conjunction with the fact that Monrovia had no black police officers at the time the plaintiff applied, created an inference of discrimination sufficient to establish a *prima facie* case. *Id.* at 1007. We further held that although the city had articulated a legitimate, nondiscriminatory reason for refusing to hire the plaintiff, the evidence that the plaintiff had introduced to establish her *prima facie* case was sufficient to create a genuine issue of material fact regarding whether the articulated reason was pretextual. *Id.* at 1008-09.

[8] The defendants in the case before us distinguish *Lowe* as involving a refusal to hire, not conditions of employment. They suggest that discrimination which manifests itself in different conditions of employment presents a separate problem from discrimination which manifests itself through a refusal to hire, and that more evidence is required to prove a *prima facie* case of the former than of the latter. We reject this premise. Title VII and the Age Discrimination in Employment Act do not suggest that different standards exist for proving discrimination in hiring versus proving discrimination on the job. Moreover, our precedents indicate the importance of allowing the factfinder to consider the existence of discrimination. "[A]n employer's true motive in an employment decision is rarely easy to discern." As we have previously noted, "[w]ithout a searching inquiry into these motives, those [acting for impermissible motives] could easily mask their behavior behind a complex web of *post hoc* rationalizations...." *Lowe,* 775 F.2d at 1009 (quoting *Peacock v. Duval,* 694 F.2d 644, 646 (9th Cir.1982)). Thus, "the question of an employer's intent to discriminate is 'a pure question of fact.' " *Id.* at 1008 (quoting *Pullman-Standard v. Swint,* 456 U.S. 273, 287-88, 102 S.Ct. 1781, 1789-90, 72 L.Ed.2d 66 (1982)). We require very little evidence to survive summary judgment precisely because the ultimate question is one that can only be resolved through a "searching inquiry"-one that is most appropriately conducted by the factfinder, upon a full record. Were we to increase the amount of proof required to survive summary judgment when conditions of employment are involved, the result would be to remove from factfinders the ability to consider claims that merit full exploration.

[9] ***1112** Applying the standards set forth in *Lowe,* we hold that Sischo-Nownejad introduced sufficient evidence to give rise to an inference of disparate treatment. Facts introduced through her deposition and the declaration of Penny Lowry, a college records officer, reveal that during the time period in question, Sischo-Nownejad was the only female, and one of the oldest, full-time faculty members in the art department. She has adduced evidence that she was subjected to treatment that differed from that accorded the remainder of the faculty. Division chairpersons reassigned Sischo-Nownejad's high-enrollment courses away from her and assigned her to teach courses that she did not want. They did not provide supplies that she needed, and they monitored the enrollment of her courses but not that of courses taught by other faculty members. "Proof of discriminatory motive ... can in some situations be inferred from the mere fact of differences in treatment." *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977). Moreover, while singling Sischo-Nownejad out for different treatment, the defendants-her superiors-referred to her as "an old warhorse" and to her students as "little old ladies," and made other derogatory remarks indicating age and gender bias. The Supreme Court has stated that "stereotyped remarks can certainly be *evidence* that [a protected characteristic] played a part" in an employment decision. *Price Waterhouse,* 490 U.S. at 251, 109 S.Ct. at 1791 (emphasis in original). In this instance, the fact that stereotyped remarks were made by Sischo-Nownejad's superiors at the same time that they were subjecting her to less favorable working conditions is sufficient to raise an inference of discriminatory intent.

[10] The defendants attempt to rebut Sischo-Nownejad's *prima facie* case of intentional discrimination by asserting that the challenged actions occurred for nondiscriminatory reasons. They state that Janssens reassigned some of Sischo-Nownejad's classes to himself, for instance, simply because he enjoyed teaching them. As in *Lowe,* however, the evidence that Sischo-Nownejad introduced to establish a *prima facie* case is direct and consists of more than the *McDonnell Douglas* presumption. Accordingly, that evidence serves a dual purpose. It is sufficient not only to establish her *prima facie* case, but also to create a genuine issue of material fact regarding whether the defendants' articulated reasons are pretextual. *See Lowe,* 775 F.2d at 1008-10. Therefore, the district court committed reversible error in granting the defendants' motion for summary judgment on Sischo-Nownejad's Title VII and Age Discrimination in Employment Act claims. We reverse the grant of summary judgment on these claims and remand for a trial on the merits.

IV. 42 U.S.C. § 1983 CLAIM

[11] Pursuant to 42 U.S.C. § 1983, a plaintiff may challenge action committed under color of state law that amounts to a deprivation of federal constitutional or statutory rights. *Smith v. Barton,* 914 F.2d 1330, 1333

(9th Cir.1990). Sischo-Nownejad alleges that the defendants, a community college and employees thereof, violated her rights to equal protection of the laws by discriminating against her on the basis of age and gender. Section 1983 provides a remedy for violations of the equal protection clause of the fourteenth amendment. *See Flores v. Pierce,* 617 F.2d 1386, 1388-89 (9th Cir.), *cert. denied,* 449 U.S. 875, 101 S.Ct. 218, 66 L.Ed.2d 96 (1980). Therefore, Sischo-Nownejad states a cognizable claim.

[12] [13] In order to prove discrimination in violation of § 1983, a plaintiff must demonstrate that the defendants acted with the intent to discriminate. *Peters v. Lieuallen,* 746 F.2d 1390, 1393 (9th Cir.1984); *Irby v. Sullivan,* 737 F.2d 1418, 1424 n. 7 (5th Cir.1984). A plaintiff who fails to establish intentional discrimination for purposes of Title VII and the Age Discrimination in Employment Act also fails to establish intentional discrimination for purposes of § 1983. *See Knight v. Nassau County Civil Service Commission,* 649 F.2d 157, 161-62 (9th Cir.), *cert. denied,* 454 U.S. 818, 102 S.Ct. 97, 70 L.Ed.2d 87 (1981); *see* ***1113** *also Stones v. Los Angeles Community College District,* 796 F.2d 270, 275 (9th Cir.1986). The district court relied on this principle to grant summary judgment on Sischo-Nownejad's § 1983 claim. However, as we explained *supra,* Part III, the district court erred in concluding that Sischo-Nownejad had failed to present sufficient evidence of intentional discrimination to defeat summary judgment for purposes of Title VII and the Age Discrimination in Employment Act. Evidence that is sufficient to create a genuine issue of material fact for purposes of those statutes also serves to create a genuine issue for purposes of § 1983. *See T & S Service Assocs., Inc. v. Crenson,* 666 F.2d 722, 724 & n. 2 (1st Cir.1981); *Whiting v. Jackson State University,* 616 F.2d 116, 121-22 (5th Cir.1980). Therefore, the district court erred when it granted summary judgment on Sischo-Nownejad's § 1983 claim. We reverse the district court on this count and remand for a trial on the merits.

V. CALIFORNIA FAIR EMPLOYMENT & HOUSING ACT CLAIMS

A.

The district court granted summary judgment to the defendants on Sischo-Nownejad's Fair Employment and Housing Act claim of intentional sex and age discrimination.[11] The court held that the standard for interpreting the Fair Employment and Housing Act is identical to that used in federal Title VII cases, but it cited a case which is not on point to support this proposition. *See Best v. California Apprenticeship Council,* 161 Cal.App.3d 626, 207 Cal.Rptr. 863 (1984). Because the district court had granted summary judgment to the defendants on Sischo-Nownejad's Title VII claim, it did the same on her Fair Employment and Housing Act claim.

Sischo-Nownejad argues that liability is more readily found under the Fair Employment and Housing Act than under Title VII. *See Ibarbia v. Regents of the University of California,* 191 Cal.App.3d 1318, 1326-28, 237 Cal.Rptr. 92, 96-98 (1987). We need not resolve this question. Even if the district court was correct in holding that the standards of liability are identical, we have already held that summary judgment was inappropriate on Sischo-Nownejad's Title VII claim. *See supra,* Part III. Therefore, summary judgment should not have been granted on the Fair Employment and Housing Act claim of intentional discrimination. We reverse on this count and remand for a trial on the merits.

B.

[14] Sischo-Nownejad's second claim under the Fair Employment and Housing Act is that the defendants failed reasonably to accommodate her handicap of high blood pressure by granting her a leave of absence.[12] The record does not give rise to ***1114** a genuine issue of material fact with respect to this allegation. The facts introduced below demonstrate that Sischo-Nownejad sought a paid sabbatical leave or an unpaid professional development leave. She made no request for a medical leave and, in fact, informed the defendants that she was "under no medical restrictions at the present time." The district court correctly granted the defendants' motion for summary judgment regarding this Fair Employment and Housing Act claim. We affirm on this count.

VI. COSTS AND ATTORNEY'S FEES

The defendants do not challenge the lower court's refusal to grant them attorney's fees pursuant to 42 U.S.C. § 1988, but request that we exercise our discretion to award them their costs and attorney's fees on appeal. They cite no authority for this request, but presumably rely upon our authority to award costs and attorney's fees as a sanction for bringing a frivolous appeal. *See* Fed.R.App.P. 38; 28 U.S.C. § 1912; *Glanzman v. Uniroyal, Inc.,* 892 F.2d 58, 61 (9th Cir.1989). This appeal was not frivolous,

as Sischo-Nownejad's claims obviously were not wholly without merit. *See McConnell v. Critchlow,* 661 F.2d 116, 118 (9th Cir.1981). Therefore, we deny the defendants' request. Costs on appeal are awarded to appellant.

VII. CONCLUSION

We reverse the district court's grant of summary judgment on Sischo-Nownejad's claims of intentional discrimination. Specifically, we remand the following claims for a trial on the merits: (1) Title VII claim of sex discrimination; (2) Age Discrimination in Employment Act claim of age discrimination; (3) 42 U.S.C. § 1983 claim of equal protection violation; and (4) Fair Employment and Housing Act claim of age and sex discrimination. We affirm the remainder of the grant of summary judgment. We deny the defendants' request for attorney's fees and costs, and grant costs to the appellant.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Parallel Citations

56 Fair Empl.Prac.Cas. (BNA) 250, 56 Empl. Prac. Dec. P 40,844, 67 Ed. Law Rep. 1109

Footnotes

1 She raises only some of her many claims on appeal. *See infra* notes 3-5.

2 For purposes of summary judgment we are required to view the evidence in the light most favorable to Sischo-Nownejad. *See Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec,* 854 F.2d 1538, 1542 (9th Cir.1988). That is what we do in this section of our opinion. Whether the facts will ultimately be found to be different in one or more respects is a matter that must be determined after a trial on the merits.

3 Sischo-Nownejad does not appeal this ruling. In referring to her claim under § 1983, her briefs address only the issue of equal protection, and not the issue of her right to privacy. Similarly, her counsel made no reference to the § 1983 right to privacy claim during oral argument.

4 Sischo-Nownejad does not appeal this ruling. In her briefs and in oral argument the only state law claims she discusses are those arising under the Fair Employment and Housing Act.

5 Sischo-Nownejad does not appeal this ruling. *See supra* note 4.

6 The district court, while acknowledging that Sischo-Nownejad's claims are based on disparate treatment, addressed much of its analysis to theories of disparate impact and hostile working environment. We reiterate that these are *distinct* theories. Disparate treatment, unlike disparate impact, requires proof of discriminatory intent. *International Brotherhood of Teamsters,* 431 U.S. at 335 n. 15, 97 S.Ct. at 1854 n. 15. Moreover, disparate treatment, unlike a hostile working environment, need not involve physical and/or verbal harassment. *See Meritor Savings Bank v. Vinson,* 477 U.S. 57, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986).

7 One way in which a plaintiff may establish an inference of discrimination is by satisfying the four-part test set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973):

1. She belongs to a protected class.
2. She applied for and was qualified for a job for which the employer was seeking applicants.
3. Despite being qualified, she was rejected.
4. After her rejection, the position remained open and the employer continued to seek applicants from people of comparable qualifications.

8 A plaintiff need not choose between a single motive and mixed motive theory at the beginning of the case. The Supreme Court has explained:

> [We do not] suggest that a case must be correctly labeled as either a "pretext" case or a "mixed motives" case from the beginning in the District Court; indeed, we expect that plaintiffs often will allege, in the alternative, that their cases are both. Discovery often will be necessary before the plaintiff can know whether both legitimate and illegitimate considerations played a part in the decision against her. At some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives. If the plaintiff fails to satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in the employment decision, then she may prevail only if she proves, following *Burdine,* that the employer's stated reason for its decision is pretextual.

Id., 490 U.S. at 247 n. 12, 109 S.Ct. at 1789 n. 12.

9 The Supreme Court did not decide *Price Waterhouse,* in which it articulated the standards governing a mixed motives case, until after Sischo-Nownejad's complaint was filed. In her briefs on appeal, as well as in oral argument, she argues mixed motives.

10 Although it may be self-evident, we note here that nothing in *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), affects our decision in *Lowe. Celotex* involved the question whether a party moving for summary judgment satisfies its burden of production by simply pointing to the absence of any record evidence demonstrating the existence of a genuine issue of material fact. *Lowe,* in contrast, involved the situation where the nonmoving party *has* produced record evidence-albeit "very little"-giving rise to an inference of intentional discrimination.

Lowe is also unaffected by the Supreme Court's decisions in *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), and *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). *Anderson* required that when a substantive claim may only be proved by "clear and convincing evidence," a district court considering a motion for summary judgment must take that heightened evidentiary standard into account. The ultimate burden of persuasion in *Lowe,* however, was that of proving intentional discrimination by a preponderance of the evidence. *Matsushita* is also not on point. There, the Supreme Court held that when the factual context rendered a claimed antitrust violation implausible because the claim made no economic sense, the plaintiffs must produce more evidence than would normally be necessary in order to defeat summary judgment. No such factual considerations existed in *Lowe,* nor do they exist in the case before us today.

11 The Fair Employment and Housing Act states, in relevant part:

§ 12940. Employers, labor organizations, employment agencies and other persons; unlawful employment practice; exceptions.

It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the ... sex of any person, to ... discriminate against the person in compensation or in terms, conditions or privileges of employment.

§ 12941. Age; unlawful employment practice by employers; exceptions.

(a) It is an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age, except in cases where the law compels or provides for such action.

Cal.Gov.Code §§ 12940-12941 (Deering 1982 & Supp.1990).

12 The Fair Employment and Housing Act states, in relevant part:

§ 19240. Employers, labor organizations, employment agencies and other persons; unlawful employment practice; exceptions.

It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the ... physical handicap ... of any person, to ... discriminate against the person in compensation or in terms, conditions or privileges of employment.

Cal.Gov.Code § 12940 (Deering 1982 & Supp.1990).

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125 Idaho 168
Court of Appeals of Idaho.

Richard Jay SOHN, Plaintiff-Appellant,
v.
Howard R. FOLEY,
Defendant-Respondent.

No. 20550. \| Jan. 3, 1994. \| Petition for Review Denied March 9, 1994.

Divorced husband brought legal malpractice action against attorney who represented him in divorce case. The District Court, Fourth Judicial District, Ada County, D. Duff McKee, J., entered summary judgment for attorney, and husband appealed. The Court of Appeals, Perry, J., held that: (1) triable issues existed regarding whether husband and attorney were in pari delicto, and (2) triable issues existed regarding proper award of damages.

Reversed and remanded.

West Headnotes (7)

[1] **Judgment**
Absence of Issue of Fact

Summary judgment is proper only when there is no genuine issue of material fact and moving party is entitled to judgment as matter of law. Rules Civ.Proc., Rule 56(c).

[2] **Appeal and Error**
Extent of Review Dependent on Nature of Decision Appealed from

On appeal from summary judgment, reviewing court exercises free review in determining whether genuine issue of material fact exists and whether moving party is entitled to judgment as matter of law.

[3] **Judgment**
Weight and Sufficiency

When ruling on motion for summary judgment, it is not within trial court's province to assess credibility of affiant or deponent when credibility can be tested in court before trier of fact.

3 Cases that cite this headnote

[4] **Judgment**
Presumptions and Burden of Proof

When assessing motion for summary judgment, trial court must liberally construe all controverted facts in favor of nonmoving party, and must make all reasonable inferences in favor of nonmoving party. Rules Civ.Proc., Rule 56(c).

3 Cases that cite this headnote

[5] **Judgment**
Attorneys, Cases Involving

Genuine issue of material fact as to whether husband and his attorney engaged in scheme to defraud wife out of life insurance policy during divorce proceedings, or whether husband believed that final property settlement agreement would require return of policy to husband and would make transfer clear to wife, precluded summary judgment for attorney on husband's legal malpractice claim pursuant to in pari delicto defense.

[6] **Judgment**
Attorneys, Cases Involving

Genuine issue of material fact as to whether husband would actually have proceeded to trial in divorce case if wife had refused to transfer life

insurance policy to him as term of settlement precluded summary judgment limiting husband's damages in legal malpractice case against his divorce attorney to those economic losses directly attributable to or connected with policy.

[7] **Attorney and Client**
Damages and Costs

In legal malpractice case based upon negligence in handling litigation for client, measure of direct damages is difference between client's actual recovery and recovery which should have been obtained but for attorney's malpractice.

Attorneys and Law Firms

**497 *169 Ellis, Brown & Sheils, Boise, for appellant. Allen B. Ellis argued.

Eberle, Berlin, Kading, Turnbow & McKlveen, Boise, for respondent. Mark S. Geston argued.

Opinion

PERRY, Judge.

Richard J. Sohn (Richard) filed an action against his former divorce attorney, Howard Foley (Foley), alleging that Foley negligently advised him during property settlement negotiations. The district court granted summary judgment to Foley, finding that the parties were *in pari delicto* and that the damages requested, which were based on a hypothetical trial of Sohn v. Sohn, were too speculative. The district court ruled, therefore, that if the action against Foley were to go to trial, the damages were limited to the economic losses directly attributable to the loss of an insurance policy of which Richard contends he would have obtained ownership, but for Foley's malpractice. Richard appeals the granting of the summary judgment. We reverse the judgment entered by the district court.

FACTS AND PROCEDURE

Richard and Margaret (Margaret) Sohn were married in 1962. During their marriage, Richard and Margaret had acquired various assets and liabilities, including a **498 *170 $300,000 indebtedness to the Internal Revenue Service. During the marriage, United Airlines (UAL), Richard's employer, began paying the premiums on a life insurance policy for Richard. In 1984, Richard assigned the policy to Margaret.

The Sohn's marriage had been deteriorating for years, and the two had discussed divorce and settlement of their property as early as 1989. The Sohns had preliminarily decided how most of their property would be divided upon their divorce. During the course of these settlement discussions, Richard corresponded frequently with Margaret, who had moved to Florida. A letter written on June 18, 1990, sent by fax, indicates that Richard had already made a comprehensive offer. It also indicated that he wished to accomplish the divorce "as quickly and cleanly as possible."

Richard again wrote Margaret on June 20, 1990. In this letter he explained his plan for distribution of the assets and liabilities and his belief it would be wiser for Margaret to accept his proposal rather than endure a trial. Richard also observed that a settlement would be better because "if we go to court I will have to list all assets to get my fair share and the IRS settlement is a liability and it will almost certainly be verified directly with the IRS. This will have an effect that neither of us will appreciate." The letter proposed that Richard would take the $300,000 tax liability plus a down payment on a house while Margaret would get the remaining assets.

Richard first met with attorney Foley on July 5, 1990. During this meeting, Richard provided Foley with a copy of the 1984 assignment of the UAL life insurance policy, informing Foley that Margaret owned the policy. Richard claims that he also told Foley that he strongly desired to get the policy back and that if he could not, he would not accept a negotiated settlement and would go to trial. According to Richard, Foley told him that it did not matter what Margaret actually agreed to, as Richard would regain ownership of the UAL policy after the divorce by operation of the "insurable interest" doctrine. Richard and Foley agreed that the policy would not be mentioned to Margaret as a matter of strategy. Richard contends, however, that the final language of the property settlement agreement was to award him the policy.

Following the meeting with Foley, Richard wrote to Margaret on a number of occasions, but did not mention the policy. Finally, in response to a letter from Margaret

stating that she believed she owned the insurance policy, Richard stated in a letter on July 22, 1990, "The insurance policy is as you interpreted it. You own it and you control it, no matter how obscene it is to hold a life insurance policy on someone else's husband ... Don't bother to respond on this issue, there is nothing you could say to make you look righteous."

Richard and Margaret finally agreed on the wording of the settlement agreement drafted by Foley, which did not specifically mention the UAL policy. The agreement did, however, state:

> The following community assets and property are hereby awarded to husband free of any and all claims by wife as his sole, separate and absolute property:
>
> . . . . .
>
> 5. All United Airline retirement benefits and programs accruing to the Plaintiff prior to September 7, 1962 and likewise all such benefits following the entry of the Decree of Divorce herein.

Following the entry of the decree, Richard tried to recover the policy. UAL, however, refused to recognize that the settlement agreement set aside the 1984 assignment. Richard, through Foley, filed a post-divorce motion under I.R.C.P. 60(b), arguing that the provision set forth above established that he owned the policy. This motion was denied. Foley then filed, on behalf of Richard, an independent action against Margaret and UAL to get the policy returned to Richard. This suit, however, is not being presently prosecuted.

Following Richard's unsuccessful attempts to get the policy back, he filed this malpractice action against Foley. Richard alleged that Foley's advice regarding the insurable interest doctrine and his drafting of the provision in the property settlement agreement **499 *171 were negligent. The district court granted summary judgment to Foley on the grounds that Richard and Foley were *in pari delicto* and that no reasonable jury could render Richard relief on his cause of action. The district court also found that if the claim against Foley were to go to trial, the measure of damages would be limited to economic losses directly attributable to, or connected with, the life insurance policy. Richard now appeals, claiming that the district court erred when it granted Foley's motion for summary judgment. For the reasons set forth below, we agree and therefore reverse the ruling of the district court.

ANALYSIS

A. *Standard of Review*

[1] [2] We first note that summary judgment under I.R.C.P. 56(c) is only proper when there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. On appeal, we exercise free review in determining whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct.App.1986).

[3] [4] When ruling on a motion for summary judgment, it is not within the trial court's province to assess the credibility of an affiant or deponent when credibility can be tested in court before a trier of fact. *Lowry v. Ireland Bank,* 116 Idaho 708, 711, 779 P.2d 22, 25 (Ct.App.1989). When assessing the motion for summary judgment, all controverted facts are to be liberally construed in favor of the non-moving party. Furthermore, the trial court must make all reasonable inferences in favor of the party resisting the motion. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991).

B. *In Pari Delicto*

[5] The district court granted Foley's summary judgment motion, finding that the parties were *in pari delicto* and that, based on the undisputed facts before the district court, no reasonable jury could grant Richard relief upon his cause of action. The district court incorporated into the written order the oral rulings made from the bench following the hearing on the motion. In that oral ruling the district court found that:

> In my view, what is unmistakably clear is Mr. Sohn was representing that his wife was going to get and keep this insurance policy. Or going to get to keep it. I guess she already had it. And that that is inconsistent with his contention now that he and Mr. Foley, through Mr. Foley's advice, were conspiring to deprive her of that item. I think that I can find that as an absolute matter of law, based upon the uncontested documents that are in the file and that have been submitted in terms of the correspondence and communications between Mr. Sohn and Mrs. Sohn.

The district court found the parties *in pari delicto* by virtue of a "scheme" to defraud Margaret out of the policy. Although the defense of *in pari delicto* has been accepted in Idaho in various contexts, *see Wilson v. Nielson,* 75 Idaho 145, 269 P.2d 762 (1954), and has been successfully

used as a defense to an attorney malpractice claim in other jurisdictions, *see, e.g., Pantely v. Garris, Garris & Garris, P.C.,* 180 Mich.App. 768, 447 N.W.2d 864 (1989), we hold that it was improperly applied in the context of a summary judgment in this case.

In Richard's complaint against Foley, as well as throughout his deposition, Richard maintains that he believed the final property settlement agreement drafted by Foley would conclusively require the return of the policy to Richard, and that the document would make that transfer clear to Margaret. He asserts that, to his knowledge, the agreement adequately and properly provided for the return of the policy. Therefore, his pre-agreement posturing did not constitute fraud. In response, Foley contends that Richard understood the document and that the two omitted the policy from the settlement agreement because they felt it would be returned to Richard as a matter of law. Foley maintains that Richard intentionally misrepresented to Margaret what Richard believed to be the law, hoping to induce Margaret to sign **500 *172 the agreement and then regaining the policy in spite of the agreement.

The district court's determination, then, was essentially an assessment of the parties' credibility. It is not the district court's province to consider credibility when making a summary judgment determination. *Lowry, supra.* There remains a genuine question of material fact as to Richard's intent during the process of negotiations. If the trier of fact finds that it was Richard's intent to deprive his wife of the policy by misrepresentations and fraud, then the doctrine of *in pari delicto* may apply. If, on the other hand, the trier of fact finds that Richard's intent was merely to wait until the final draft of the agreement was presented to Margaret to bring up reassignment of the policy, then the doctrine would not apply.

It is not the place of the trial judge to assess the credibility of the parties and then to rule based on that determination. The trier of fact should ultimately make the credibility determination taking into account all the evidence, including the various letters sent by Richard to Margaret. Therefore, it was error for the district court to grant the summary judgment based on the doctrine of *in pari delicto.*

C. *Summary Judgment on Damages*

[6] As part of the summary judgment order, the district court also found that, "It is determined that Plaintiff's damages, if any, shall be limited to those economic losses directly attributable to or connected with the term life insurance policy in controversy herein." In its oral ruling on the motion, the district court stated:

> On the partial summary judgment on the question of damage I'm satisfied that a relitigation of Sohn versus Sohn is not the measure of damage that should be attributable in this case. I think it would be completely speculative, as a matter of law, to attempt to try to figure out what might have been the result had a settlement not been reached and had the matter gone to trial. I agree with the case cited by the defendant that this is just beyond the realm of what the law would countenance as proof of damage in a tort lawsuit.
>
> I would further observe that in my view, the plaintiff's contention in this area is fundamentally not credible as a matter of law and that no jury would accept the contention that if he did not get his way on this insurance that he'd-that it was a deal breaker and that he'd go to litigation wherever he might have to go to litigation, whether in Idaho, or Florida, or Costa Rica, or wherever.

Again, as noted above, the credibility of the parties is not a proper consideration when deciding a motion for summary judgment. The district court found it unlikely, in its view, that Richard would have actually proceeded to trial had he thought he would not get the insurance policy. Although this may seem unlikely, it is nonetheless a question for the trier of fact at trial. What Richard might have done had Foley correctly advised him about the insurable interest doctrine or had Foley properly drafted the settlement agreement are questions of fact. Thus, at trial, the question of whether Richard would actually have proceeded to trial in the divorce case if Margaret refused to transfer the policy as a term of settlement is a question for the jury. If the jury responds affirmatively, it will then be necessary to determine the measure of damages, based on what Sohn should have recovered upon a trial in the divorce proceedings.

[7] In a legal malpractice case based upon negligence in handling litigation for a claimant, the measure of direct damages is the difference between the client's actual recovery and the recovery which should have been obtained but for the attorney's malpractice. *See,* 1 RONALD E. MALLEN and JEFFREY M. SMITH, LEGAL MALPRACTICE § 16.1 at 890 (3d ed. 1989); *Chocktoot v. Smith,* 280 Or. 567, 571 P.2d 1255 (1977); *Pickett, Houlon & Berman v. Haislip,* 73 Md.App. 89, 533 A.2d 287 (1987). Thus, the trier of fact in the malpractice action must decide what the outcome would have been in the previous case if the lawyer had performed properly, a process that has been described as a "suit within a suit." *Chocktoot,* 571 P.2d at 1257. While presenting evidence of such damages in the present **501 *173 case may be difficult and complex, this measure of recovery is not inherently speculative so as to render the claimed damages unrecoverable as a matter of law. At trial, Richard will bear

the burden of proving the existence and amount of such damages with reasonable certainty. *Fuller v. Wolters,* 119 Idaho 415, 422, 807 P.2d 633, 640 (1991); *Moeller v. Harshbarger,* 118 Idaho 92, 93, 794 P.2d 1148, 1149 (Ct.App.1990); *Eliopulos v. Kondo Farms, Inc.,* 102 Idaho 915, 919, 643 P.2d 1085, 1089, (Ct.App.1982). If he fails to meet this burden, recovery may be denied. It was improper, however, for the district court to grant partial summary judgment foreclosing any opportunity for such proof. Therefore, the district court also erred when it granted the motion for partial summary judgment limiting the damages to economic losses directly attributable to the life insurance policy.

CONCLUSION

The district court erred in granting the summary judgment based on its determination that Richard's statements were not credible. The district court also erred when it granted the motion for summary judgment based on the speculative nature of the damages. We reverse the order granting summary judgment and remand this case for further proceedings consistent with this opinion.

WALTERS, C.J., and LANSING, J., concur.

Parallel Citations

868 P.2d 496

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128 Idaho 682
Supreme Court of Idaho,
Boise, March 1996 Term.

Ann STANSBURY, Plaintiff-Appellant,
v.
BLUE CROSS OF IDAHO HEALTH SERVICE, INC., Defendant-Respondent.

No. 22108. | June 7, 1996.

Former employee brought action against former employer under Americans with Disabilities Act (ADA) and Human Rights Act. The Fourth Judicial District Court, Ada County, Deborah A. Bail, J., entered summary judgment for employer. Employee appealed. The Supreme Court, Silak, J., held that: (1) issues of material fact existed as to whether employee could have performed essential functions of her position with reasonable accommodation, precluding summary judgment on claim alleging failure to make reasonable accommodation, and (2) issues of material fact existed as to whether employee was qualified for position, precluding summary judgment on claim alleging intentional discrimination.

Vacated; remanded.

Schroeder, J., dissented and filed opinion.

West Headnotes (7)

[1] **Appeal and Error**
Extent of Review Dependent on Nature of Decision Appealed from

In appeal of district court's entry of summary judgment, Supreme Court employs same standard as that used by trial court when ruling on the motion. Rules Civ.Proc., Rule 56.

[2] **Appeal and Error**
Judgment

In appeal of district court's grant of summary judgment, Supreme Court construes record in light most favorable to nonmoving party and draws all reasonable inferences and conclusions in that party's favor. Rules Civ.Proc., Rule 56.

[3] **Judgment**
Absence of Issue of Fact

If reasonable people could reach differing conclusions or draw conflicting inferences from record, motion for summary judgment must be denied. Rules Civ.Proc., Rule 56.

[4] **Courts**
Decisions of United States Courts as Authority in State Courts

When Supreme Court has not had occasion to determine standards applicable to adjudication of state claims patterned on federal law, Court may look to that body of federal law for guidance.

1 Cases that cite this headnote

[5] **Judgment**
Labor and Employment

Issues of material fact existed as to whether former employee could have performed essential functions of her position with reasonable accommodation of her disabilities, precluding summary judgment in her claim under ADA and Human Rights Act alleging failure to make reasonable accommodation; employee's affidavit indicated that employer ignored employee's requests that ergonomist analyze her work area. Americans with Disabilities Act of 1990, § 101(8), 42 U.S.C.A. § 12111(8); I.C. § 67-5909; Rules Civ.Proc., Rule 56.

4 Cases that cite this headnote

[6] **Judgment**
Employees, Cases Involving

Issues of material fact existed as to whether former employee was qualified for her position, precluding summary judgment in her intentional discrimination claim. Americans with Disabilities Act of 1990, § 102(a), 42 U.S.C.A. § 12112(a); I.C. § 67-5909(1); Rules Civ.Proc., Rule 56.

1 Cases that cite this headnote

[7] **Civil Rights**
Practices Prohibited or Required in General; Elements

To establish unlawful discrimination based on disability, employee was required to prove that she: was disabled within meaning of ADA; was qualified, that is, was able to perform essential functions of the job, with or without reasonable accommodation; and was discharged because of disability. Americans with Disabilities Act of 1990, § 102(a), 42 U.S.C.A. § 12112(a).

1 Cases that cite this headnote

Attorneys and Law Firms

**266 *682 Jim Jones & Associates, Boise, for appellant. Jim Jones argued.

Moffatt, Thomas, Barrett, Rock & Fields, Boise, for respondent. Richard C. Fields argued.

Opinion

**267 *683 SILAK, Justice.

Appellant Ann Stansbury (Stansbury) sought relief under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.*, and the Idaho Human Rights Act (IHRA), I.C. § 67-5901, *et seq.* The district court entered summary judgment for respondent Blue Cross of Idaho Health Service, Inc. (Blue Cross), finding that Stansbury had failed to prove that, with or without reasonable accommodations for her disabilities, she was qualified for the employment position she held. We vacate and remand.

I.

FACTS AND PROCEDURAL BACKGROUND

Prior to July 8, 1991, Stansbury worked for Blue Cross of Oregon as a customer service representative. Stansbury interviewed with Blue Cross for a similar position, but was informed that no such positions were available. Instead Blue Cross offered Stansbury a position as a claims analyst. Stansbury accepted the position with an understanding that she could later apply for a transfer to customer service.

Blue Cross had in place performance goals which it expected its employees to meet. Blue Cross used gradually escalating goals over a nine month period to raise its new employees' abilities to the level expected of fully trained claims examiners. One performance goal required the ability to process claims at a rate of at least 85% of the performance standards, with no more than a 3% payment error rate and no more than a 6% coding error rate. At the completion of her three month probationary period, Stansbury received a production rating of 50%, with a 1.6% payment error rate and a 6% coding error rate. Stansbury's supervisor informed her that she was "performing above what is expected" and she was given an overall performance rating of 96%.

Shortly thereafter, Stansbury began to experience back and right arm and shoulder pains. In a discussion with her supervisor, Stansbury noted a similar experience at Blue Cross of Oregon. She stated that her previous employer had successfully alleviated her pains by providing her with an adjustable work-station designed by an ergonomist. Blue Cross took no action.

After her probationary period, Stansbury became increasingly unable to meet the escalating production goals. At the conclusion of her nine month training period, Stansbury was processing claims at a rate of 47% of the performance standards, with a 4% payment error rate and a 5% coding error rate. Nonetheless, she received an overall performance rating of 86%. Her supervisor noted that Stansbury tended to be easily distracted and inattentive. Her next evaluation noted a small improvement to a 55% production rating, with a 2.6% payment error rate and a 1%

coding error rate. She received an overall performance rating of 88%.

After working at Blue Cross for over a year, Stansbury requested a transfer to the customer service department. Blue Cross denied her request on the basis that new performance standards required an employee seeking a transfer to have at least a 95% overall performance rating.

Since her production levels were still below expectations, Blue Cross instituted weekly meetings between Stansbury and her supervisor. Blue Cross hoped the weekly meetings would provide suggestions and continued training to help Stansbury raise her production ratings. Instead, Stansbury felt that no help was being given to her at these meetings, that they placed additional stress upon her, and that they caused her to experience severe depression. When Stansbury communicated the detrimental effect that she believed these meetings were having on her, they were moved from Fridays to Mondays. At these weekly meetings Stansbury repeatedly informed her supervisors that she was experiencing back and shoulder pains and requested an adjustable desk set up by an ergonomist.

In late 1992, Stansbury experienced intestinal problems which required surgery. She took medical leave and returned to work a month later. After her return, Blue Cross conducted another performance evaluation. Stansbury's production rating was 56%, with a payment error rate of 3.4% and coding **268 *684 error rate of 1.2%, for an overall performance rating of 87%. As a result, Blue Cross placed Stansbury on a sixty day probation. She was informed that the failure to achieve the established production goals by the end of the probationary period would result in termination of her employment.

After being placed on probation, Stansbury received the adjustable desk she had requested. She informed her supervisors that her arm and shoulder felt better and her processing rate increased to 67%. Shortly thereafter Stansbury developed problems with her thumb which resulted in her production rate falling to 54%. Blue Cross refused her request for an ergonomist to help her set up her desk. Stansbury visited a hand specialist who diagnosed her with carpal tunnel syndrome and tendinitis, later determined to be radial tunnel syndrome. Stansbury informed her supervisors and filed a worker's compensation claim with the Idaho Industrial Commission. When the probationary period expired and Stansbury still had not met the established production goals, Blue Cross terminated her employment.

Stansbury filed suit in district court alleging disability discrimination under IHRA and ADA, as well as age discrimination under IHRA and the federal Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* Blue Cross moved for summary judgment.[1] In opposition, Stansbury submitted her own affidavit asserting that "I could have done the work for Blue Cross, if they had listened to me and provided the help I requested." Stansbury also submitted affidavits from her professional counselor and a consulting physician to the Department of Health and Welfare. These affidavits indicated that Stansbury was psychologically and physically disabled and that Blue Cross' failure to recognize and accommodate her impairments made it "difficult if not impossible to perform at the level expected at Blue Cross of Idaho."

The district court granted Blue Cross' motion for summary judgment finding that all of Stansbury's claims failed because she did not prove that she was qualified to perform the essential functions of the position. In light of her consistent failure to meet the production goals set by Blue Cross, the district court concluded that Stansbury had failed to show that, with or without reasonable accommodation for her disabilities, she would have been able to process claims at a rate of 85%.

Stansbury appealed only as to her disability claims and did not raise on appeal her age discrimination claims.

II.

ISSUES ON APPEAL

1. Whether the district court erred in considering, analyzing, and deciding Stansbury's disability claim solely as a claim for intentional disability discrimination.

2. Whether the court erred in determining, as a matter of law, that Stansbury had not presented an adequate claim of intentional disability discrimination.

III.

STANDARD OF REVIEW

[1] [2] [3] Stansbury appeals the district court's entry of summary judgment against her. In such a case, the Idaho Supreme Court employs the same standard as that used by the trial court when ruling on the motion. *Avila v. Wahlquist,* 126 Idaho 745, 747, 890 P.2d 331, 333 (1995). The Court construes the record in a light most favorable to the non-moving party and draws all reasonable inferences

and conclusions in that party's favor. *Id.* If reasonable people could reach differing conclusions or draw conflicting inferences from the record the motion must be denied. *Cates v. Albertson's Inc.,* 126 Idaho 1030, 1033, 895 P.2d 1223, 1226 (1995). Summary judgment is only proper if, after reviewing the pleadings, depositions, admissions, and affidavits, there is no genuine issue of material fact and the ****269 *685** moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c).

IV.

ANALYSIS

A. A Genuine Issue Of Material Fact Exists As To Whether With Reasonable Accommodation For Her Disabilities Stansbury Could Have Performed The Essential Functions Of The Position.

[4] ADA prohibits discrimination against a qualified individual with a disability. 42 U.S.C § 12112(a). Prohibited discrimination includes "not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability ..." 42 U.S.C. § 12112(b)(5)(A). Similarly, IHRA prohibits disability discrimination but "shall not apply if the particular disability, even with reasonable accommodation by the employer, prevents the performance of the work required by the employer in that job." I.C. § 67-5909. When this Court has not had occasion, as here, to determine the standards applicable to the adjudication of state claims patterned on federal law, this Court may look to that body of federal law for guidance. *See, Bowles v. Keating,* 100 Idaho 808, 811-12, 606 P.2d 458, 461-62 (1979).

[5] For purposes of the summary judgment motion below and again on appeal, Blue Cross assumed Stansbury was "disabled" as defined under ADA. As a result, we must determine whether Stansbury has made a sufficient showing that she was a qualified individual with a disability to preclude summary judgment. A qualified individual with a disability is a disabled person "who, with or without reasonable accommodation, can perform the essential functions of the employment position...." 42 U.S.C § 12111(8). Deference is given to the employer's determination as to the essential functions of the position. *Id.; see also,* 29 C.F.R.App. to Part 1630-Interpretative Guidance On Title I of the Americans With Disabilities Act, pg. 406. Blue Cross insists that the key-punch tasks, specifically the ability to process claims at 85% of the performance standards, was an essential function of Stansbury's position at Blue Cross.

The district court found that all of Stansbury's claims failed because she did not demonstrate that with reasonable accommodation she could have performed the essential functions of her job and processed claims at a rate of 85%. We disagree and find that Stansbury has raised a sufficient factual dispute to survive Blue Cross' motion for summary judgment. While at Blue Cross, Stansbury requested several possible accommodations which she believed would have enabled her to meet the 85% production goal. Her affidavit shows that Blue Cross ignored several of her requests, including (1) the provision of an ergonomist to analyze her work area and ensure that it was set up in a manner which would alleviate her back and shoulder pains, (2) a discontinuance of the weekly meetings, and (3) a transfer to a customer service position.2

In her affidavit, Stansbury asserts that "I could have done the work for Blue Cross, if they had listened to me and provided the help that I requested." This assertion is reinforced by the affidavit of Charles D. Steuart who found that "without recognition of [her] impairments and job structuring taking the impairments into account, she would not have been able to function adequately" at Blue Cross. The affidavit of the counselor Joetta Fulgenzi also states that without recognition of her chronic depression, Stansbury "would have found it difficult if not impossible to perform at the level expected by Blue Cross of Idaho."

Taking all of Stansbury's assertions to be true, we find that she has raised sufficient facts from which reasonable people could conclude that had Blue Cross provided the requested accommodations she would have ****270 *686** been able to meet the production quotas. In light of this factual dispute, we vacate the district court's entry of summary judgment against her.

B. The District Court Erred in Granting Summary Judgment on Stansbury's Intentional Discrimination Claim.

[6] In addition to her claim for failure to make reasonable accommodation, Stansbury also alleged an intentional discrimination based on disability claim. Blue Cross insisted that it fired Stansbury for a purely nondiscriminatory reason, *i.e.,* her failure to meet the production standards. Stansbury asserted this basis for termination was pretextual. However, the district court did not reach this issue as it found that Stansbury failed to demonstrate that she was qualified to do her job, an essential element of both disability claims.

[7] Both IHRA and ADA prohibit the discharge of a qualified individual with a disability on the basis of that

individual's disability. I.C. § 67-5909(1), 42 U.S.C. § 12112(a). In *Smith v. Barton,* 914 F.2d 1330 (9th Cir.1990), the Ninth Circuit noted that where a plaintiff alleges intentional disability discrimination and the defendant disavows any reliance on the disability in making the employment decision, the analytical framework of Title VII cases should be employed. *Id.* at 1339. To establish unlawful discrimination based on disability Stansbury must prove that she (1) was disabled within the meaning of the statute, (2) was qualified, that is, was able to perform the essential functions of the job, with or without reasonable accommodation, and (3) was discharged because of her disability. *See, e.g., Tyndall v. National Educ. Centers, Inc. of California,* 31 F.3d 209, 212 (4th Cir.1994); *White v. York Intern. Corp.,* 45 F.3d 357, 360-61 (10th Cir.1995).

For the purposes of summary judgment, Blue Cross conceded that Stansbury was disabled within the meaning of the relevant statutes. The fact that Stansbury was discharged and replaced by a non-disabled person is also not in controversy. Because we conclude that a factual dispute exists as to whether Stansbury was qualified for the position, we vacate the grant of summary judgment on the intentional discrimination claim.

V.

CONCLUSION

IHRA and ADA seek to provide qualified disabled individuals with the same employment opportunities that are available to persons without disabilities. To that end, an employer is required to provide reasonable accommodations to a disabled employee which would enable that employee to perform the essential functions of his or her position. Stansbury has raised a sufficient factual issue concerning whether she could have met the 85% production rating had Blue Cross provided her with the accommodations she requested.

Because we find that Stansbury has raised a sufficient factual dispute concerning whether she was qualified for the position at Blue Cross, we vacate the district court's entry of summary judgment, and remand for further proceedings consistent with this opinion.

Costs on appeal to Stansbury.

McDEVITT, C.J., and JOHNSON and TROUT, JJ., concur.

SCHROEDER, Justice dissenting.

The district court found that Stansbury's claims failed because she did not demonstrate that with reasonable accommodation she could have performed the essential functions of her job and processed claims at a rate of 85 percent. This Court reverses the district court's decision, citing several bases.

First, Stansbury asserts that Blue Cross ignored her request to provide an ergonomist to analyze her work area and ensure that it was set up in a manner which would alleviate her back and shoulder pains. Under the circumstances of this case that is a bare assertion that should be given no weight. In fact, Blue Cross had provided an ergonomist for Stansbury when she was employed in Oregon. Any accommodation that might have been made was within her knowledge, but she failed to set forth any facts establishing what such an accommodation might be. If a reasonable accommodation were possible, Stansbury knew what it was and should have told the district court, rather than simply ****271 *687** making a conclusory assertion that an ergonomist should have been provided.

The second ground upon which the Court relies is the failure of Blue Cross to discontinue weekly meetings with Stansbury. The record does establish that Blue Cross had changed the date of the weekly meetings to accommodate Stansbury's concerns. In essence Stansbury says that she should not have been supervised. This Court should not impose such a burden upon an employer.

The third basis for the Court's decision is that Blue Cross failed to transfer Stansbury to a customer service position. That would not be an accommodation. That would be a requirement that an employer hire a person for a job different from what that person was initially hired to do.

The affidavits of the doctor and the counselor that are cited provide no basis to determine what reasonable accommodations could have been made. The assertions in these affidavits are simply too vague to provide guidance as to what Blue Cross failed to do that it could have done.

The district court correctly analyzed the issue as follows:

The ability to process claims at a rate of at least 85% of her performance standard was an essential function of Ann Stansbury's job. *See Bolton v. Scrivner, Inc.,* 836 F.Supp. 783, 788 n. 4 (W.D.Okla.1993) (ADA does not require an employer to modify the actual duties of a job in order to accommodate an individual who is not physically capable of performing those duties). Unfortunately, the plaintiff was not able to meet the performance standard required for

her job.

The law also requires employers to make reasonable accommodations so that an employee with a disability can perform the essential functions of her position. Unfortunately, there is no evidence that, other than requiring her employer to lower its performance standards-which is not required, the plaintiff would have been able to perform the essential functions of her position even with reasonable accommodation by Blue Cross. The plaintiff has failed to show that with a reasonable accommodation she was qualified to do her job, an essential element of her disability discrimination claim. *C.f., Lutter v. Fowler,* 1 A.D. Cases 861, 864, 1986 WL 13138 (D.D.C.1986) (granting summary judgment in favor of employer in Rehabilitation Act case where, assuming that employee in fact had a mental handicap, employee had failed to present any evidence that he would have been able to perform the essential functions of his job with a reasonable accommodation).

The plaintiff has failed to establish that, with or without reasonable accommodation, she was qualified to do her job, an element essential to her disability discrimination claim on which she would bear the burden of proof at trial. Because this is a key element, the claim fails.

Conclusory and speculative assertions should not be sufficient to deny a motion for summary judgment that has been supported by specific allegations of fact. There is no showing of facts by Stansbury of what a reasonable accommodation would have been that would have allowed her to perform the job she was hired to do. The district court decision should be affirmed.

Parallel Citations

918 P.2d 266, 17 A.D.D. 307, 8 NDLR P 105

Footnotes

1 For purposes of its summary judgment motion below and on appeal, Blue Cross assumed that as a result of her physical disability, but not her alleged mental disability, Stansbury was "disabled" as defined under ADA.

2 We note that all of these appear to be potential accommodations according to the Equal Employment Opportunity Commission's guidelines, "reasonable accommodation may include but is not limited to ... job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices...." 29 C.F.R § 1630.2(*o*)(2)(ii).

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350 F.3d 1061
United States Court of Appeals, Ninth Circuit.

Lynda STEGALL, Plaintiff-Appellant,
v.
CITADEL BROADCASTING COMPANY; Citadel Communications Corporation; Marathon Media LP, Defendants-Appellees.

No. 02-35399. | Argued and Submitted June 2, 2003. | Decided Dec. 2, 2003. | As Amended Jan. 6, 2004.

Employee, a female on-air radio station personality who was fired, allegedly because she complaining of gender discrimination and wage disparities between male and female employees, filed retaliation claim against former employer under Title VII and Washington Law Against Discrimination (WLAD). The United States District Court for the Eastern District of Washington, Edward F. Shea, J., granted summary judgment for employer. Employee appealed. The Court of Appeals, Ferguson, Circuit Judge, held that genuine issue of material fact, as to whether employee's termination nine days after she complained to new station manager and co-program director of gender discrimination and pay inequity under past owner was influenced by improper motives, precluded summary judgment for employer.

Reversed and remanded.

Gould, Circuit Judge, dissented and filed opinion.

West Headnotes (9)

[1] Federal Courts
Trial De Novo

Court of Appeals reviews district court's decision to grant summary judgment de novo. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

1 Cases that cite this headnote

[2] Courts
Decisions of United States Courts as Authority in State Courts

Washington courts look to federal law when analyzing retaliation claims. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a); West's RCWA 49.60.210.

2 Cases that cite this headnote

[3] Civil Rights
Practices Prohibited or Required in General; Elements

To make out prima facie case of retaliation under Title VII, employee must demonstrate that (1) she engaged in protected activity, (2) she suffered adverse employment action, and (3) there was causal link between her activity and employment decision. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

100 Cases that cite this headnote

[4] Civil Rights
Retaliation Claims

Under *McDonnell Douglas* analysis, once employee makes out prima facie case of retaliation, burden shifts to employer to articulate legitimate, nondiscriminatory reason for adverse employment action; if employer does so, employee bears ultimate burden of demonstrating that articulated reason was merely pretext for discriminatory motive. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

107 Cases that cite this headnote

[5] Civil Rights
Motive or Intent; Pretext

In retaliation action, employee can show pretext either directly by persuading court that discriminatory reason more likely motivated

employer, or indirectly by showing that employer's proffered explanation is unworthy of credence. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

26 Cases that cite this headnote

[6] **Civil Rights**
Retaliation Claims

In retaliation case, "direct evidence" is evidence which, if believed, proves fact of discriminatory animus without inference or presumption. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

48 Cases that cite this headnote

[7] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

In retaliation case, when employee offers direct evidence of discriminatory motive, triable issue as to actual motivation of employer is created even if evidence is not substantial; in contrast, when direct evidence is unavailable and employee proffers only circumstantial evidence that employer's motives were different from its stated motives, court requires specific and substantial evidence of pretext to survive summary judgment. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.; Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

41 Cases that cite this headnote

[8] **Civil Rights**
Motive or Intent; Pretext

In mixed motive cases, it does not make sense to ask if employer's stated reason for terminating employee is pretext for retaliation, when employer has offered more than one reason for action that it took; rather, relevant inquiry is whether discrimination is a motivating factor in the challenged action. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

19 Cases that cite this headnote

[9] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Genuine issue of material fact, as to whether improper motives influenced radio station owner's termination of daily on-air personality nine days after she complained to new station manager and co-program director of gender discrimination and pay inequity under past owners, precluded summary judgment on terminated employee's retaliation claim under Title VII and Washington Law Against Discrimination (WLAD), regardless of whether it was analyzed as straightforward "pretext" case or as "mixed motive" case. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.; Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a); West's RCWA 49.60.210.

33 Cases that cite this headnote

Attorneys and Law Firms

***1062** Laura B. Allen, Seattle, Washington, for the plaintiff-appellant.

Courtney W. Wiswall (argued) and Paul Buchanan (briefed), Portland, Oregon, for the defendants-appellees.

Appeal from the United States District Court for the Eastern District of Washington; Edward F. Shea, District Judge, Presiding. D.C. No. CV-00-05064-EFS.

Before: LAY,*FERGUSON, and GOULD, Circuit Judges.

Opinion

FERGUSON, Circuit Judge.

The issue in this case is: what showing of pretext must a plaintiff in a retaliation suit make in order to overcome a

defendant's motion for summary judgment, where the defendant has alleged legitimate reasons for the plaintiff's termination. Appellant Lynda Stegall ("Stegall") appeals the District Court for the Eastern District of Washington ("District Court")'s grant of summary judgment in favor of defendant Marathon Media, L.P. ("Marathon"), which foreclosed a jury trial on Stegall's retaliation claim under Title VII of the Civil Rights Act of 1964 and the Washington Law Against Discrimination ("WLAD"). The District Court held that, although Stegall established a *prima facie* claim of retaliatory discharge against Marathon, she was unable to demonstrate that Marathon's nondiscriminatory reasons for terminating her were a pretext for retaliation. Stegall alleges that she was fired from KORD, a country music radio station, in retaliation for making complaints about gender discrimination and wage disparities between male and female employees at ***1063** KORD. Because Stegall raises a triable claim with respect to her retaliation claim, we reverse the District Court's grant of summary judgment in favor of Marathon.

I BACKGROUND

A. Facts

Lynda Stegall was employed by Citadel Broadcasting Company ("Citadel") as an on-air personality at KORD, a country music station that played recent country music hits,[1] since 1993. Beginning in 1997 or 1998, Stegall began to make complaints to her managers at Citadel that her male on-air personality co-host was sexually propositioning her and using sexually suggestive language on and off the air. She also complained that she was being paid less than her male counterparts and requested a raise. Allegedly, Citadel management did not adequately address her complaints.

Stegall's problems with KORD escalated in October 1998 when Stegall took time off from work because she fell ill from the stress and anxiety she was experiencing as a result of KORD's gender discrimination, and because her managers were being unresponsive to her grievances. When she returned to work, Stegall averred that Curt Cartier ("Cartier") who, at the time, was employed as the program director for another one of Citadel's radio stations, exhibited a great deal of hostility toward her. Stegall stated in her deposition that prior to her two week leave of absence, she and Cartier had been friends. Stegall had previously spoken with Cartier, as well as other station employees, on various occasions, about her complaints of gender discrimination at KORD. However, Stegall noted that upon her return, Cartier refused to speak with her. Stegall believed that Cartier was upset because she had walked out of KORD to protest the unequal treatment that she was receiving, and because she was given a raise in salary as a result.

In addition, Cartier allegedly told other station employees that he was angry at Stegall for getting what she wanted and had only been able to do so because she was a woman. On two occasions after coming back to work, Stegall alleges that Cartier yelled at her and denigrated her based on her gender, calling her names such as "slut," "bitch," and "whore," in the course of arguments that were seemingly about unrelated station matters.

On November 9, 1999, Marathon Broadcasting ("Marathon") purchased five Pasco, Washington radio stations from Citadel, including KORD. After taking over KORD, Marathon initially retained most KORD employees, a decision that was necessary to ensure continual, uninterrupted broadcasting.[2] Upon Marathon's purchase of Citadel's stations, Eric Van Winkle ("Van Winkle") became the new general manager ("GM"), responsible for supervising KORD and the four other stations that Marathon acquired from Citadel. Prior to assuming the GM position with Marathon, Van Winkle worked in the central sales department for the five Pasco, Washington radio stations when they were owned by Citadel. Shortly after Van Winkle's promotion, he hired Paul Drake and Curt Cartier to serve as co-program directors of KORD under Marathon. Drake and Cartier previously ***1064** held positions as program directors for other radio stations in the Pasco cluster. As program directors, Drake and Cartier were responsible for the content and presentation of KORD.

Due to the change in management and the impending station changes that it was bound to bring, Stegall inquired with Marathon about the security of her employment at KORD on several occasions before she was terminated. Shortly after Van Winkle became manager and Drake became co-program director, Stegall stopped by their individual offices to ask whether her job was secure. Both responded affirmatively.

In early December 1999, Stegall and Drake, now her direct supervisor at KORD, had a "get to know you" meeting during which Stegall relayed to Drake the complaints of gender discrimination that she had made to Citadel's managers in the past, and the problems she had been having with Citadel up until Marathon's purchase of KORD. Stegall stated in her deposition that she brought Drake up to speed about her prior concerns, and expressed a desire to see Marathon conduct things differently and remedy the gender inequities. Stegall noted that Drake did not speak much during this meeting and, as a result, she felt very uncomfortable.

Nine days after Stegall complained to Drake, on December 15, 1999, Marathon fired Stegall and one other female employee, Kristin Crume. Stegall was told during a meeting with Van Winkle, Drake and Cartier that they were planning changes for KORD which did not include her and, as a result, she was being terminated. At this time, Stegall inquired if anything she had done brought on the decision to fire her, and she was explicitly told that it had not. Rather, the decision, she was told, was solely about the future of KORD.

Similarly, when Stegall later applied for unemployment benefits, Marathon informed the state Employment Security Department that a business decision based on changing the programing and formatting was responsible for Stegall's termination, and that nothing she had done caused the discharge. However, after the commencement of this litigation, Van Winkle and Drake stated in their depositions that Stegall was fired in part because they were not satisfied with her overall attitude during the brief period of time[3] she was employed by Marathon.
After Stegall's termination, Marathon began making changes to KORD. KORD was switched from station-selected music to a computerized music service; Marathon brought in Leah Knight, a syndicated host from Seattle; changed each of the shows and did on-air promotions about the format changes; stressed a different "brand" of country music;[4] removed all of the daily on-air personalities; and replaced seven announcers on five shifts including every morning show host. The only former daily on-air personality who remained at KORD after the broad station change was Ed Dailey, who was removed from daily duties and given a four-hour Sunday morning "oldies" show. However, Stegall and one other woman[5] were the only employees ***1065** who were fired from KORD and not re-assigned to another station within the Pasco cluster.[6]

B. Procedural history

On August 2, 2000, Stegall filed this litigation against Citadel and Marathon, alleging gender discrimination, sexual harassment, and retaliation in violation of both Title VII and WLAD. On December 19, 2001, Stegall stipulated to the dismissal of all claims of sexual harassment and retaliation against Citadel, and stipulated to the dismissal of all claims of sexual harassment against Marathon. The District Court granted summary judgment to Marathon on Stegall's Title VII and WLAD claims of illegal retaliation, finding that Stegall was unable to demonstrate that Marathon's legitimate reasons for terminating her were pretextual. Because Stegall has proffered a substantial amount of specific circumstantial evidence that Marathon's reasons for terminating her were motivated by retaliation, we reverse the District Court's decision.

II STANDARD OF REVIEW

[1] We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 (2000). The District Court granted summary judgment in favor of Marathon, finding that, although Stegall made a *prima facie* showing of retaliation, she could not rebut the legitimate reasons put forth by Marathon for terminating her. "We review the district court's decision to grant summary judgment de novo." *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1219-20 (9th Cir.1998) (citations omitted). Viewing the evidence in the light most favorable to Stegall, we must determine whether any genuine issues of material fact exist, and whether the district court correctly applied the relevant substantive law. *Id.* at 1220. In doing so, "[t]he evidence of the [nonmoving] party is to be believed, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in the light most favorable to[her]." *Lindahl v. Air France*, 930 F.2d 1434, 1437 (9th Cir.1991).

III DISCUSSION

[2] Stegall contends that she was illegally terminated in retaliation for making wage discrimination complaints to Marathon that she believed to be the result of gender discrimination in violation of Title VII and the WLAD. Because Washington courts look to federal law when analyzing retaliation claims, we consider Stegall's Washington state law claim and federal claim together. *See Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 969 (9th Cir.2002); *Graves v. Dep't of Game*, 76 Wash.App. 705, 887 P.2d 424, 428 (1994).

A. *Prima facie* case of retaliation

[3] Stegall alleges that Marathon terminated her employment in retaliation for complaining to Marathon of a disparity in pay and bonuses between herself and her male counterparts. Under § 704 of the Civil Rights Act of 1964, it is unlawful "for an employer to discriminate against any of his employees ... because [the employee] has opposed any practice made an unlawful employment practice by [Title VII], or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3 (2000). To make out a *prima facie* case of retaliation under Title VII, Stegall must demonstrate that "(1) she engaged in a protected activity, (2) she ***1066** suffered an adverse employment action, and

(3) there was a causal link between her activity and the employment decision." *Raad v. Fairbanks North Star Borough Sch. Dist.,* 323 F.3d 1185, 1196-97 (9th Cir.2003). If Stegall is able to assert a *prima facie* retaliation claim, the "burden shifting" scheme articulated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), applies. *See Villiarimo v. Aloha Island Air, Inc.,* 281 F.3d 1054, 1064 (9th Cir.2002).

[4] Under *McDonnell Douglas,* once Stegall makes out a *prima facie* case of retaliation, "the burden shifts to [Marathon] to articulate a legitimate, non-discriminatory reason for the adverse employment action." *Manatt v. Bank of Am., N.A.,* 339 F.3d 792, 800 (9th Cir.2003). If Marathon articulates such a reason, Stegall "bears the ultimate burden of demonstrating that the reason was merely a pretext for a discriminatory motive." *Id.* (internal quotation marks and citation omitted).

B. Pretext

[5] Stegall has two avenues available for showing that Marathon's legitimate explanation for firing her is actually a pretext for retaliation. The first is by "directly persuading the court that a discriminatory reason more likely motivated the employer[,] or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) (citation omitted).

[6] **[7]** As in all civil cases, Stegall can prosecute her case using either direct or circumstantial evidence tending to prove that Marathon terminated her employment in retaliation for making complaints of gender discrimination. " 'Direct evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption.' " *Godwin v. Hunt Wesson, Inc.,* 150 F.3d at 1221(quoting *Davis v. Chevron, U.S.A., Inc.,* 14 F.3d 1082, 1085 (5th Cir.1994)). "When the plaintiff offers direct evidence of discriminatory motive, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial." *Id.* In contrast, when direct evidence is unavailable, the *Godwin* court noted, and the plaintiff proffers only circumstantial evidence that the employer's motives were different from its stated motives, we require "specific" and "substantial" evidence of pretext to survive summary judgment. *Id.* at 1222.

Although we note that the Supreme Court's recent decision in *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (U.S.2003), may undermine *Godwin* to the extent that it implies that direct evidence is more probative than circumstantial evidence, we agree with the *Godwin* court that Stegall must proffer "specific" and "substantial" evidence of pretext to overcome Marathon's summary judgment motion. *See Manatt,* 339 F.3d at 801 ("Because Manatt failed to introduce any direct or specific and substantial circumstantial evidence of pretext, summary judgment for the [employer] must be affirmed."); *Brown v. City of Tucson,* 336 F.3d 1181, 1188 (9th Cir.2003); *Bradley v. Harcourt, Brace and Co.,* 104 F.3d 267, 270(9th Cir.1996) ("To avoid summary judgment, Bradley must do more than establish a *prima facie* case and deny the credibility of the [defendant's] witnesses. She must produce specific, substantial evidence of pretext.") (internal quotation marks and citations omitted).

Nevertheless, it is important to note that *Desert Palace* affirmed the value and import of circumstantial evidence in *all* cases. In the course of affirming a decision of our ***1067** circuit sitting en banc that, "[i]n order to obtain an instruction under § 2000e-2(m) [of the 1991 Civil Rights Act], a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice [,]' " 123 S.Ct. at 2155, the Court stressed "the utility of circumstantial evidence in discrimination cases." *Id.* at 2154. The Court stated that "[t]he reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.' " *Id.* (quoting *Rogers v. Missouri Pacific R. Co.,* 352 U.S. 500, 508 n. 17, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957)).

Moreover, the Court also recognized the critical role that circumstantial evidence plays even in criminal cases: "The adequacy of circumstantial evidence also extends beyond civil cases; we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required." *Id.* Finally, the Court noted that "juries are routinely instructed that 'the law makes no distinction between the weight or value to be given to either direct or circumstantial evidence.' " *Id.* (quoting 1A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions, Criminal § 12.04(5th ed.2000)). Accordingly, we refuse to make such a distinction in Stegall's case.

C. "Single motive" versus "mixed motive" cases

Further complicating the inquiry in a Title VII case is the varying terminology that courts routinely utilize. As we explained in *Costa v. Desert Palace, Inc.,* 299 F.3d 838 (9th Cir.2002) (en banc), courts often categorize cases as

either "mixed motive" or "single motive" (sometimes also termed "pretext" cases). The distinction between the two types of cases is as follows:

> "In [single-motive] cases, 'the issue is whether either illegal or legal motives, but not both, were the 'true' motives behind the decision.' In mixed-motive cases, however, there is no one 'true' motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate."

Id. at 856(citing *Price Waterhouse v. Hopkins,* 490 U.S. 228, 260, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989)). The significance of the distinction between "single motive" and "mixed motive" is most often seen towards the end of a trial when the district court must instruct the jury.

[8] In mixed motive cases, of which Stegall's case is arguably one, it does not make sense to ask if the employer's stated reason for terminating an employee is a pretext for retaliation, when the employer has offered more than one reason for the action that it took. Rather, the relevant inquiry in a "mixed motive" case is distinct from that of a "single motive" or pretext case. We articulated the proper framework in our en banc opinion *Costa v. Desert Palace:*

> [I]n cases in which the evidence could support a finding that discrimination is one of two or more reasons for the challenged decision, at least one of which may be legitimate, the jury should be instructed to determine first whether the discriminatory reason was "a motivating factor" in the challenged action. If the jury's answer to this question is in the affirmative, then the employer has violated Title VII.

299 F.3d at 856-57.

Similarly, our opinion in *Sischo-Nownejad v. Merced Community College District* summarizes the test as follows:

> ***1068** The analysis in a case involving mixed motives is somewhat different. The *Price Waterhouse* [*v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989)] plurality found the [*Texas Dep't of Community Affairs v.*] *Burdine,* [450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981),] formula unsuitable for mixed motive cases.... Instead, it adopted a simpler approach. Under *Price Waterhouse,* the plaintiff must show that it is more likely than not that a protected characteristic "played a motivating part in [the] employment decision." Once that is done, the employer may escape liability only by proving by way of an affirmative defense that the employment decision would have been the same even if the characteristic had played no role.

934 F.2d 1104, 1110 (9th Cir.1991) (citations omitted).

In the end, the inquiry is straightforward: "[p]ut simply, the plaintiff in any Title VII case may establish a violation through a preponderance of evidence (whether direct or circumstantial) that a protected characteristic played 'a motivating factor.' " *Costa,* 299 F.3d at 853-54. Even at summary judgment, it is important not to lose sight of the ultimate question that will be before the court, should the plaintiff survive summary judgment. *See Costa,* 299 F.3d at 857("The employee's ultimate burden of proof in all cases remains the same: to show by a preponderance of the evidence that the challenged employment decision was 'because of' discrimination [or, in this case, retaliation]."). With these general principles of law in mind, we now turn to the merits of Stegall's retaliation claim. We analyze Stegall's case as both a pretext case and a mixed motives case, and find that her case survives summary judgment under either theory.

D. Stegall's retaliation claim

[9] The District Court found, and Marathon concedes, that Stegall established a *prima facie* case of retaliation. Therefore, we embark upon our analysis of Stegall's retaliation claim by examining Marathon's stated reasons for terminating her employment. Marathon has offered two reasons to justify its firing of Stegall. At the time it terminated her, Marathon's management stated that it was due to changes that were being made to KORD overall. This was consistent with what Marathon told the state Employment Security Department in response to its inquiry about Stegall's application for benefits. However, after Stegall commenced this lawsuit, Marathon's managers also stated that she was terminated because she had a negative attitude about her job. These are legitimate, nondiscriminatory reasons for Marathon's termination of Stegall. Therefore, under *McDonnell Douglas,* the burden now shifts to Stegall to put forth evidence that Marathon's reasons are pretextual. *Manatt,* 339 F.3d at 800.

Stegall offers myriad circumstantial evidence to show that Marathon's explanations for her termination are pretextual. Under *Burdine,* Stegall can show pretext in two ways: either "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. at 256, 101 S.Ct. 1089.

Stegall's circumstantial evidence is sufficient to raise a genuine issue of material fact because it demonstrates that an illegitimate reason more likely motivated Marathon, or was at least a motivating factor in her dismissal. Furthermore, Stegall has raised a genuine issue of material fact as to whether Marathon's second reason ***1069** for firing her, her allegedly negative attitude, is unworthy of credence.

While it is true that Stegall must "produce evidence in addition to that which was sufficient for her *prima facie* case in order to rebut [Marathon]'s showing [,]" *Godwin,* 150 F.3d at 1220, it is improper to ignore the evidence in support of Stegall's *prima facie* case. *See Lowe,* 775 F.2d at 1008. Thus, the District Court erred by examining each piece of Stegall's evidence in isolation, and failing to consider the timing of Stegall's termination in its pretext analysis.

1. The timing of Stegall's termination

Stegall argues that the timing of her termination, which occurred nine days after her discrimination complaints, supports her claim that Marathon's explanations were pretextual. We recently reaffirmed that the timing of adverse employment action can provide strong evidence of retaliation. "Temporal proximity between protected activity and an adverse employment action can by itself constitute sufficient circumstantial evidence of retaliation in some cases." *Bell v. Clackamas County,* 341 F.3d 858, 865 (9th Cir.2003) (finding sufficient evidence to support retaliation claim where low performance reviews immediately followed plaintiff's complaints). Although we have refused to infer causation from timing alone where the gap between plaintiff's protected activity and the adverse employment action extended to 18 months, *Villiarimo v. Aloha Island Air, Inc.,* 281 F.3d 1054, 1065 (9th Cir.2002), we have found timing highly probative even when the period between the employee's complaints and adverse action far exceeded the time interval in Stegall's case. *See, e.g., Yartzoff v. Thomas,* 809 F.2d 1371, 1376 (9th Cir.1987).

Here, a mere nine days lapsed between Stegall's complaints of discrimination to her new manager, Paul Drake, and 16933 her termination. Although Marathon disputes that Stegall actually informed Drake of her complaints, Stegall asserts that she did so, and we must view the evidence in the light most favorable to her. *See Godwin,* 150 F.3d at 1220. In addition, both Marathon and Stegall admit that many station employees were aware of Stegall's complaints, and gender discrimination was one of them. Stegall had made it known throughout the station over the course of her employment with KORD that she resented her lower pay because she believed it was due to her gender. It is clear that Stegall presented credible evidence that she had a discussion with Drake, her new manager, about discriminatory gender pay. Still, setting aside the implausibility of Marathon's contentions that Drake was unaware of Stegall's complaints of gender discrimination, we must resolve issues of credibility in favor of the non-moving party. *See Suzuki Motor Corp. v. Consumers Union of U.S., Inc.,* 330 F.3d 1110, 1132 (9th Cir.2003) ("we 'must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence.' ") (quoting *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496, 520, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991)).

Marathon attempts to explain the timing of Stegall's termination by noting that it coincided with the other station wide changes. However, in almost the same breath, Marathon asserts that KORD's change phase continued a year and a half after Stegall's termination, when they offered the termination of another employee, Gary Mitchell, to counter Stegall's contention that she and another female employee were the only people terminated from KORD. Marathon cannot have it both ways.

***1070** The brief period of time that Marathon supervised Stegall before terminating her, merely 24 days, also undermines Marathon's assertion that it terminated her because she had a negative attitude and was not a team player. Although both sides vigorously dispute this issue, it nevertheless casts doubt on Marathon's ability to fairly assess Stegall's performance and attitude accurately, thus strengthening Stegall's contention that illegitimate considerations informed Marathon's decision.

2. Stegall's relationship with Cartier

Although timing, standing *alone,* may be insufficient to raise a genuine issue with respect to pretext, we do not need to rely solely on timing in this case because there exists substantially more. Of significance is Stegall's evidence of her tumultuous relationship with Cartier and his subsequent role in Stegall's termination. Although Marathon disputes that Cartier was aware of Stegall's prior complaints of gender discrimination to Citadel, the record is otherwise. Stegall alleged and offered deposition testimony that not only did she personally tell Cartier of her complaints of gender discrimination, but also that Cartier markedly changed after Stegall took two weeks off of work to protest the inequities at KORD.

Upon her return to work, Cartier's relations with Stegall took a turn for the worse. Stegall asserts that, although they

were friends before she took time off, he refused to speak with her at all when she came back to work. Stegall attempted to discuss her walk out with Cartier, but he refused to hear her out. During an argument shortly after her return to work, he denigrated her based on her gender (calling her a "slut," "bitch," and "whore").

Furthermore, Marathon admits that during discussions amongst its management, which included Cartier, about the station's re-structuring, Cartier was "adamant" that Stegall be terminated, despite her positive traits.7 Cartier's insistence that Stegall and Kristin Crume, another employee who also complained of gender discrimination, be fired was attested to by Drake, Cartier's co-program director. Moreover, both Van Winkle and Drake assured Stegall shortly before she was terminated that her job was secure, giving rise to the inference that Cartier's input may have been determinative of Marathon's decision to fire Stegall.

Stegall was not alone in her observations of Cartier's animosity towards her. Tamara Peterson, a former KORD employee, testified in her deposition that Cartier told her that he was angered by Stegall's leave of absence and subsequent return to work.8 According to Peterson, Cartier called Stegall "a spoiled brat" and resented the fact that she had walked out, yet was nonetheless allowed to return to work. Furthermore, Kristin Crume testified in her deposition that Cartier stated, shortly after learning of Marathon's purchase of KORD, that he would not be surprised ***1071** "when the new company comes in that Lynda [Stegall]'s ass would be blown out of the water." Although not yet a manager at the time he made the comment to Crume, the evidence thus far demonstrates that it is probable Cartier decided to do just that once he became Stegall's manager, because of ill will that he harbored against Stegall due to her complaints. *See Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1286 (9th Cir.2001) (stating that defendant's "exasperation, lack of sympathy, and even animosity towards [the plaintiff]" provided additional support for the jury's verdict in favor of the plaintiff).

Add to Cartier's animosity circumstantial evidence that Drake was also not supportive of Stegall's facts of gender discrimination,9 and there can be no other outcome than to allow this case to go to a jury.

3. The station overhaul and Stegall's "negative attitude"

Marathon asserts that it fired Stegall due to its overhaul of KORD. However, Marathon distorts and exaggerates the extent of the overhaul. While Marathon asserts that all employees were removed, this is simply not true. Most employees either left of their own accord or were re-assigned to another position at KORD, or at another one of the Pasco cluster stations. Only Stegall and Crume were expressly terminated. In short, the only employees terminated by KORD were the two women who had complained of gender discrimination.

Moreover, Marathon elaborated on the station overhaul by adding Stegall's negative attitude as a further reason she was terminated. Although Marathon did not offer this reason until after the start of litigation, it has now gone to great lengths to find evidentiary support that Stegall was a problem employee. However, cutting against Marathon are its assurances to Stegall that her job was secure, shortly before her termination. Although Marathon attempts to explain its assurances to Stegall, by arguing that it did so out of necessity to ensure Stegall's radio broadcasts would be free of bias, we reiterate that it is not within our province to delve into these factual disputes; rather, we leave them for the trier of fact. We note, however, that this does not explain why Marathon continued to tell the Employment Security Department that Stegall was not at fault for the termination, even after she was no longer on the airwaves.

Finally, although Stegall does not expressly designate her case a "mixed motives" case, both her brief and the record reveal that it can be construed as one. Indeed, a plaintiff need not decide what kind of a case she is bringing at the outset. *See Price Waterhouse,* 490 U.S. at 247 n. 12, 109 S.Ct. 1775 ("Nothing in this opinion should be taken to suggest that a case must be correctly labeled as either a "pretext" case or a "mixed-motives" case from the beginning in the District Court; indeed, we expect that plaintiffs will often allege, in the alternative, that their cases are both.... At some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives."). Accordingly, it is common to have an employer's reasons for terminating an employee fleshed out during the course of litigation. *See, e.g., Lindahl v. Air France,* 930 F.2d 1434 (9th Cir.1991) (Noting that "[s]imply because an explanation comes after the beginning of litigation does not make it inherently ***1072** incredible[,]" but finding on the facts of the case before it that the employer's differing reasons suggested the later reason was fabricated.).

Since it is uncontroverted that Marathon has offered two reasons for firing Stegall, yet we hold that the record in this case would support a finding that Marathon had illegitimate motives, it is logical to examine the case as one involving "mixed motives." *See Price Waterhouse,* 490 U.S. at 244-45, 109 S.Ct. 1775. The timing of Stegall's termination, the evidence of Stegall's problems with

Cartier, and a probe of the station's proffered reasons for terminating Stegall reveal that her protected activity was most likely "a motivating factor" in her termination. *See Costa,* 299 F.3d at 853-54. At the very least, Stegall has raised a triable issue about Marathon's motivations. Stegall has also made the requisite showing that Marathon's legitimate reasons for terminating her were pretextual, because she has persuaded us that "a discriminatory reason more likely motivated [Marathon]." *Burdine,* 450 U.S. at 256, 101 S.Ct. 1089. Thus, Stegall is entitled to a trial on this basis as well.

Analyzed as either a straightforward "pretext" case or a mixed motives case, the record reveals that it is probable that Stegall's protected activity motivated, at least in part, Marathon's decision to terminate her. Whether or not one accepts one or both of Marathon's explanations for terminating Stegall, one cannot ignore the evidence, albeit circumstantial, that Cartier, who resented Stegall for complaining of gender discrimination, played a significant role in her termination, thus raising a genuine issue of material fact about whether Stegall's termination was in fact retaliatory.

Lastly, our decision comes after careful scrutiny of the record and in due regard of the history of discrimination against women in the workplace. Throughout the record, both Marathon and Citadel management repeatedly echoed the all too familiar complaints about assertive, strong women who speak up for themselves: "difficult," "negative attitude," "not a team player," "problematic." The district courts must reject such sexual stereotypes and learn to identify the oft employed rhetoric that could reveal illegitimate motives.

IV CONCLUSION

The record in this case raises a triable issue as to whether Stegall's termination was influenced by improper motives on the part of Marathon. The standard is relatively low:

> [I]n evaluating whether the defendant's articulated reason is pretextual, the trier of fact must, at a minimum, consider the same evidence that the plaintiff introduced to establish her *prima facie* case. When that evidence, direct or circumstantial, consists of more than the *McDonnell Douglas* presumption, a factual question will almost always exist with respect to any claim of a nondiscriminatory reason. The existence of this question of material fact will ordinarily preclude the granting of summary judgment.

Sischo-Nownejad, 934 F.2d at 1111 (citations omitted).

Moreover, "[w]e require very little evidence to survive summary judgment precisely because the ultimate question is one that can only be resolved through a 'searching inquiry'-one that is most appropriately conducted by a factfinder, upon a full record." *Id.* We have often stated that, because motivations are difficult to ascertain, such an inquiry should be left to the trier of fact: "[A]n employer's true motive in an employment decision is rarely easy to discern. As we have previously noted, '[w]ithout a searching inquiry into ***1073** these motives, those [acting for impermissible motives] could easily mask their behavior behind a complex web of *post hoc* rationalizations....' " *Id.* (internal quotation marks and citations omitted).

Our opinion seeks only to allow Stegall the opportunity to prove Marathon's motivations for terminating her. Because Stegall has marshaled specific and substantial evidence of improper motives on the part of Marathon, we **REVERSE** the District Court's grant of summary judgment in favor of Marathon, and **REMAND** for proceedings consistent with this opinion.

GOULD, Circuit Judge, dissenting.

A summary judgment rejected plaintiff's employment retaliation claim, and we decide if trial is needed to determine whether the termination of an employee who was an on-air personality at a radio station, as part of a format change and overhaul of the radio station, was in reality a pretext for retaliation for her prior complaint about asserted gender-based wage discrimination at the radio station. I conclude that no genuine issue of fact is presented on pretext in the context of the station's undisputably broad changes of on-air personalities after a new owner took control after an acquisition.

Marathon Media, L.P. ("Marathon"), defendant-appellee, acquired a group of radio stations and promptly thereafter changed the format of the flagship radio station that it acquired, KORD, from modern country music to more traditional country music. Lynda Stegall, plaintiff-appellant, an on-air personality at KORD before the Marathon acquisition and during a transition period of about six weeks thereafter, was terminated when Marathon changed KORD's format and did a station overhaul that included replacement of every daily on-air personality. Stegall brought suit contending that her employment was terminated in retaliation for gender-based wage

discrimination complaints that she made during a meeting with Marathon's new management of KORD shortly before the format change at KORD. Marathon, on the other hand, contends that Stegall was fired because of a broad station change of format and personalities and because of Stegall's poor attitude during Marathon's management of KORD. Because Marathon's articulated reasons for terminating Stegall's employment with KORD are legitimate, nondiscriminatory reasons, we must determine if genuine fact issues were presented whether Marathon's articulated reasons were a pretext for an illegal employment action.

I

On November 9, 1999, Marathon Media bought five Pasco, Washington radio stations from Citadel Broadcasting, including KORD, a country music station that played recent country music hits. Marathon at first kept most employees at KORD, in order to maintain radio broadcasts at KORD. Lynda Stegall was one of the employees at first retained. She had been employed as an on-air personality at KORD since 1993. After Marathon acquired KORD, Marathon hired a new general manager ("GM"), Eric Van Winkle, to supervise KORD and other acquired stations. Van Winkle hired Paul Drake and Curt Cartier as co-program directors of KORD under Marathon. Drake and Cartier had been program directors at other of the acquired radio stations. Drake and Cartier then controlled KORD's content and presentation.

Neither Van Winkle, Drake, nor Cartier supervised Stegall before Marathon's acquisition of KORD. However, Stegall testified that Cartier treated her "very badly" after Stegall returned from a two week leave of absence that she took to protest ***1074** wage discrimination at KORD, when KORD was under Citadel management. On December 6, 1999, after Marathon's acquisition, Stegall told Drake, now her supervisor, about prior complaints she had made to Citadel complaining that she was paid less than on-air male personalities because of her gender.

Nine days later, on December 15, 1999, KORD fired Stegall and another woman announcer, Kristin Crume, because Van Winkle, Drake and Cartier, according to Stegall's testimony, were planning "big changes" for KORD. When Stegall later applied for unemployment benefits, KORD said that "a business decision based on changing the programing and formatting," led to Stegall's termination.

After Stegall's termination, Marathon management switched KORD from station-selected music to a computerized music service; brought in Leah Knight, a syndicated host from Seattle; changed the morning show; midday show; afternoon show; nighttime show and overnight show; did on-air promotions about the format changes; stressed a different and more traditional, less contemporary, type of country music broadcast; removed all the daily on-air personalities; and replaced seven announcers on five shifts including every morning show host. The only former daily on-air personality who remained at the station after the broad station change was Ed Dailey, removed from daily duties and given a four-hour Sunday morning "oldies" show. Later, during this litigation, Van Winkle and Drake testified that Stegall was also fired because they did not like parts of Stegall's performance during their brief supervision of KORD and that this influenced their decision not to retain Stegall during the station overhaul.

On December 19, 2001, Stegall stipulated to dismissal of her sexual harassment and retaliation claims against Citadel, 16942 and to dismissal of her sexual harassment claims against Marathon. The district court gave Marathon summary judgment rejecting Stegall's Title VII and state law claims of retaliation. The district court was correct and we should affirm.

II

Stegall argues that she was illegally terminated in retaliation for making wage discrimination complaints to Marathon about lower pay she was receiving because of her gender in violation of Title VII and the Washington Law against Discrimination ("WLAD"). Because Washington courts look to federal law when analyzing retaliation claims, we analyze Stegall's Washington state law claims and federal claims together. *See Little v. Windermere Relocation, Inc.,* 301 F.3d 958, 969 (9th Cir.2002); *Graves v. Dep't of Game,* 76 Wash.App. 705, 887 P.2d 424, 428 (1994).

Under § 704 of Title VII of the Civil Rights Act of 1964, it is unlawful "for an employer to discriminate against any of his employees ... because [the employee] has opposed any practice made an unlawful employment practice by [Title VII], or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3. *See Clark County Sch. Dist. v. Breeden,* 532 U.S. 268, 269, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001); *see also Trent v. Valley Electric Association, Inc.,* 41 F.3d 524, 526 (9th Cir.1994) ("Courts have interpreted 'unlawful employment practices' to include a panoply of actions involving discrimination and sexual harassment.").

Because the district court granted summary judgment to Marathon we review Stegall's claims de novo. *Oliver v. Keller,* 289 F.3d 623, 626 (9th Cir.2002). In doing so, we ***1075** view all evidence in the light most favorable to Stegall and determine whether there are any genuine issues of material fact precluding summary judgment. *Id.*

To prevail on a retaliation claim brought under Title VII, Stegall must first establish a prima facie case of illegal retaliation by showing that (1) she was engaging in a protected activity; (2) she suffered an adverse employment decision; and; (3) a causal link exists between her activity and the employment decision. *Trent,* 41 F.3d at 526; *see McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-03, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). In an appropriate case, "[t]he causal link may be established by an inference derived from circumstantial evidence." *Jordan v. Clark,* 847 F.2d 1368, 1376 (9th Cir.1988). If Stegall establishes a prima facie case of illegal retaliation, the burden of production shifts to Marathon to articulate a legitimate nondiscriminatory reason for terminating Stegall's employment. *Wrighten v. Metro. Hosps. Inc.,* 726 F.2d 1346, 1354(9th Cir.1984). If Marathon gives such a reason, the burden of production shifts to Stegall to prove that Marathon's articulated reason is a pretext for illegal retaliation, with pretext shown "either directly persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1980) (citation omitted). If Stegall satisfies her burden of producing evidence that Marathon's reasons are pretextual, summary judgment is inappropriate and a jury is entitled to infer that the motive for Marathon's employment action was retaliatory. *Reeves v. Sanderson Plumbing Products,* 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

A

Because Marathon does not question that Stegall has established a prima facie case of retaliation, I begin analysis by looking at Marathon's actions and testimony to determine whether Marathon has satisfied its burden, of production, to articulate a legitimate, nondiscriminatory reason for terminating Stegall's employment. Despite Stegall's argument that Marathon's reasons are not legitimate, the reasons extended by Marathon, if asserted in good faith and not as a pretext, are legitimate business interests sufficient to support the termination of an employee.

Marathon offers two reasons for terminating Stegall's employment. First, Marathon states that it terminated Stegall's employment because of its decision to overhaul the programming of KORD from a modern country station that played the latest country hits to a more traditional country music radio station that played older country songs. Second, Marathon states that it terminated Stegall because of a perception among Marathon management that Stegall did not place a priority on maintaining strong working relationships and thus displayed a poor attitude toward her job and her co-workers. The reasons articulated by Marathon satisfy Marathon's burden of production to articulate legitimate nondiscriminatory reasons for terminating Stegall's employment. *See Aragon v. Republic Silver State Disposal,* 292 F.3d 654, 661 (9th Cir.2002).

B

Because Marathon has articulated legitimate, nondiscriminatory reasons for terminating Stegall, the burden shifts back to Stegall to prove that Marathon's articulated reasons are a pretext for illegal retaliation by "either directly persuading the court that a discriminatory reason more likely motivated the employer or indirectly ***1076** by showing that the employer's proffered explanation is unworthy of credence." *Texas Dep't of Cmty. Affairs,* 450 U.S. at 256, 101 S.Ct. 1089 (1980).

First, Stegall argues that we should infer pretext because the timing of Marathon's decision to terminate her occurred shortly after she made a wage complaint to Marathon management. Although Stegall previously made gender-based wage discrimination complaints to Citadel management at KORD, she renewed her gender-based wage discrimination complaints to Drake, her immediate supervisor under Marathon management of KORD, on December 6, 1999, and was fired 9 days later on December 15, 1999. Stegall argues that the timing of Marathon's decision to fire her after her wage discrimination complaint to Marathon management shows pretext because her performance at KORD was good and because one of the persons responsible for deciding to fire her, Curt Cartier, was upset that Stegall took a two week leave of absence to protest wage discrimination while KORD was under Citadel ownership.

As for her first point, timing of a termination can be significant, and with other evidence of pretext in an appropriate case may be persuasive to show pretext. In *Little v. Windermere Relocation, Inc.,* we stated that evidence of pretext was shown from the timing of the employer's decision to fire the employee because the employee was fired "within minutes" of her complaint,

because the employee had a documented record of superior performance, and because the employee's supervisor was suspiciously uninvolved in the employer's decision to terminate the plaintiff. 301 F.3d 958 (9th Cir.2002). Stegall's case against Marathon as to significance of timing to show pretext is nothing like the case presented by the terminated employee in *Little.* Unlike the employee in *Little,* Stegall has presented no substantial evidence that the timing of her termination provides evidence of Marathon's pretext. Marathon terminated Stegall about six weeks after it purchased KORD from Citadel, whereas in *Little* the plaintiff's termination occurred minutes after the employee's complaint about a rape by a customer. Further, while the employee's termination in *Little* stood alone, within weeks of Stegall's termination, Marathon replaced *every* daily on-air personality at KORD with new talent in an effort to increase KORD's ratings. As Drake testified:

> I wanted to make changes. And I think Eric [Van Winkle] described wholesale changes. KORD was hurting financially. It was not billing what it should. We wanted to make a splash.... We changed the morning show. We changed the midday. We changed the afternoon. We changed the nighttime show. We changed the overnight show. We changed the music. We made complete changes around the clock.

Further, the supervisor of the employee in *Little* was not consulted about the termination, whereas here Stegall's direct supervisor, Drake, was involved in the decision to terminate Stegall's employment. And Stegall has not presented any evidence that Cartier knew of any of Stegall's prior complaints to Citadel or that he knew that Stegall was making complaints about gender-based wage discrimination.1

***1077** That Stegall's employment was terminated nine days after making a gender-based wage discrimination complaint, in the context of undisputed facts presented including the wholesale changes at the station, does not raise any genuine issue of fact on pretext by the employer. Although Marathon's decision to fire Stegall was not remote to her wage discrimination complaint to Marathon management, there was insufficient evidence of pretext based on the timing of Marathon's decision because the timing of Marathon's decision to fire Stegall is incontestably supported by its articulated reason of instituting a broad overhaul of KORD.

Second, Stegall argues that Marathon's two reasons for terminating her-the need to conduct a broad format change and her poor attitude-are shifting and inconsistent reasons which provide evidence of pretext. Stegall also argues that Marathon's second articulated reason for laying her off, her poor work attitude, supports a finding of pretext since Marathon did not articulate this reason until the commencement of litigation. It is correct that "fundamentally different justifications for an employer's action ... give rise to a genuine issue of fact with respect to pretext since they suggest the possibility that neither of the official reasons was the true reason." *Washington v. Garrett,* 10 F.3d 1421, 1434 (9th Cir.1994). But different justifications for an adverse employment action will not defeat summary judgment if those reasons are "not incompatible." *See Nidds v. Schindler Elevator Corp.,* 113 F.3d 912, 918 (9th Cir.1996). *See also Aragon,* 292 F.3d at 661 ("We do not infer pretext from the simple fact that [an employer] has two different, although consistent, reasons for laying off [an employee.]").

I conclude that Marathon's reasons for terminating Stegall are not inconsistent and do not support a showing of pretext. That Stegall's work attitude was perceived by Marathon to be poor is not inconsistent with Marathon's articulated reason that it fired Stegall to effect a broader station overhaul. The articulated reason of Stegall's poor attitude supports Marathon's decision not to retain Stegall during the overhaul that replaced every daily on-air personality at KORD. Also, as we have previously held, that an employer has given an explanation not previously stated until after the commencement of litigation does not by itself create sufficient evidence of pretext. *See Lindahl v. Air France,* 930 F.2d 1434, 1438(9th Cir.1991) ("Simply because an explanation comes after the beginning of litigation does not make it inherently incredible."). *See also Coleman v. Quaker Oats Co.,* 232 F.3d 1271, 1286 (9th Cir.2000) (holding that employer's reasons for termination which "mainly detail[ed] the earlier one [it gave]," was not sufficient evidence of pretext).

Third, Stegall argues that one of the underlying reasons for Marathon's termination of Stegall-the broad station overhaul of KORD-is not worthy of credence. Stegall argues in support of this position ***1078** that a change in "the programming and format" of a radio station is common in radio and that a change in format does not usually require a change of on-air personalities. Stegall also asserts that the "overhaul" claimed by Marathon involved nothing more than routine changes. But even if some format changes of radio stations are done without personnel changes, that cannot be said to render illegitimate a radio station's new management's business objective if it prefers to have fresh faces and talent to advance its chosen format.

Marathon's reason that it was overhauling KORD is supported by its actions during and after Stegall's

termination: Although some on-air personalities were transferred to other stations, some resigned, and others were terminated, Marathon did replace every daily on-air personality, not merely Stegall, soon after Marathon bought KORD. KORD under Marathon moved from having a station-selected music format to a computer-automated music selection, a system that reduced KORD's reliance on its employee announcers to select music. KORD changed its station format from modern country to older country music. These changes of personnel, operation, and program format at KORD strongly support Marathon's articulated reason that it conducted a broad station overhaul of KORD and on the undisputed evidence foreclose Stegall's assertion of pretext.

Stegall submitted insufficient evidence that Marathon's articulated legitimate, nondiscriminatory reasons for terminating her were a pretext for illegal retaliation to avoid a summary judgment based on Marathon's legitimate reasons for termination. I would affirm the district court's grant of summary judgment to Marathon Media on Stegall's illegal retaliation claims under Title VII and Washington Law. Accordingly, I must respectfully dissent.2

Parallel Citations

92 Fair Empl.Prac.Cas. (BNA) 1769, 03 Cal. Daily Op. Serv. 10,332, 2003 Daily Journal D.A.R. 13,006

III

Footnotes

* Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

1 The five Pasco radio stations that Marathon acquired from Citadel were KORD (a country music station); KEYW (an adult contemporary station); KXRX (a classic rock station); KTHK (a rock station); and KFLD (an AM radio station).

2 The only employees who were not initially retained by Marathon at KORD were management-level employees who chose to accept positions with Citadel at other locations in the United States.

3 Stegall was employed by Marathon for only 24 days.

4 The format was changed from "contemporary" country to "classic/ today's" country. Van Winkle characterized the old format as "way too contemporary," "a teenybopper thing," and "too hip for the audience." The new management broadcast more classic country music that included singers such as George Strait.

5 Kristin Crume was the other employee terminated on the same day as Stegall. She also previously complained of gender discrimination at KORD.

6 Although Marathon cites the termination of another employee, Gary Mitchell, that employee was fired nearly a year and a half after Stegall.

7 Marathon admitted that Stegall had name recognition and thus, visibility, and performed well at "remotes," off site station promotion activities.

8 Although Marathon objects to Peterson's deposition testimony on the grounds that it is inadmissible hearsay. Such statements fall squarely outside of the definition of hearsay. Federal Rule of Evidence 801 reads, in relevant part, as follows:

> "(d) Statements which are not hearsay. A statement is not hearsay if-
>
> ...
>
> (2) Admission by party-opponent. The statement is offered against a party that is (A) the party's own statement, in either an individual or a representative capacity...."

FEDERAL RULES OF EVIDENCE 801 (2002).

9 Stegall asserted that during her meeting with Drake in which she discussed her complaints of gender discrimination, he was virtually non-responsive.

1 The majority also relies on *Bell v. Clackamas County*, 341 F.3d 858 (9th Cir.2003), holding in that case that temporal proximity between protected activity and adverse employment action might be sufficient circumstantial evidence of retaliation. *Bell* adds nothing to analysis based on *Little*, for in *Bell*, as in *Little*, an adverse employment action, in the case of *Bell* it was negative

performance reviews, "immediately followed plaintiff's complaint" in the majority's words. The majority also cites *Yartzoff v. Thomas,* 809 F.2d 1371, 1376 (9th Cir.1987), which the majority contends found "highly probative" timing between employee complaint and adverse action that "far exceeded" the 9 day interval between Stegall's complaint and her termination. Although *Yartzoff* held that the negative performance ratings in that case coming three weeks after protected activity of Yartzoff's complaints was sufficient to establish a prima facie case on causation, each case turns on its facts and the majority here ignores the undisputed evidence proving that Stegall's termination was part of a broader set of terminations incidental to a new ownership's desire to change programming and on-air personalities. That all on-air announcers were terminated from their full-time positions precludes the negative inference that the majority draws under a rational interpretation of the evidence.

2 Apart from my disagreement with the majority's pretext assessment, I also regret to say that the majority's analysis distorts and misunderstands our law. First, though circumstantial evidence was approved by the Supreme Court in *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003), as a way to show mixed motive, rejecting the prior view of many circuits that direct evidence was required for a mixed motive jury instruction, that has nothing to do with this case which deals with the traditional and long-established assessment of the three-part test required by the Supreme Court's *McDonnell Douglas* precedent to assess whether a summary judgment may be given in a Title VII case. It has always been the law, in our circuit and elsewhere, that circumstantial evidence is admissible and can be considered on the issues of whether a prima facie case has been made, whether the employer has shown legitimate reasons for a termination, and whether the reasons given are pretextual. Nothing is new in that regard. I fully accept that Stegall can argue circumstantial evidence. It is simply not sufficient in the context of the station's broad change of program and personalities after an acquisition and the entry of new management.

Second, the majority appears to be "tutoring" Stegall's counsel to attempt to present this case as a mixed motive case, when the majority asserts of mixed motive cases that "Stegall's case is arguably one." This case however was dismissed on summary judgment. No issue was presented about any request for a mixed motive jury instruction, which was premature. The majority's dicta about mixed motive cases properly has nothing to do with analysis of whether the record before the court when it granted summary judgment showed a genuine issue of fact on pretext.

Third, the majority makes much of Stegall's problems with Cartier which occurred long before the change of management. No genuine dispute on pretext of the termination as part of broad station change is shown by Cartier's dissatisfaction expressed when Stegall previously walked off the job.

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138 Idaho 200
Supreme Court of Idaho,
Boise, November 2001 Term.

Richard V. THOMAS, M.D.,
Plaintiff-Counterdefendant-Appellant,
v.
MEDICAL CENTER PHYSICIANS, P.A., Richard Aguilar, M.D., Fredric W. Birkeland, M.D., Gary Botimer, M.D., Eugene Brown, M.D., Michael A. Chenore, M.D., Michael T. Crane, Elaine Davidson, M.D., Michael Dee, M.D., Michael R. Djernes, M.D., James R. Dzur, M.D., Robert J. Emerson, M.D., Jeffrey A. Hansen, M.D., Leo S. Harf, M.D., Ross S. Higgins, John Hlavinka, M.D., Timothy Hodges, D.O., Robert J. Hurst, Miers C. Johnson, M.D., Harold V. Kunz, M.D., James E. Loveless, M.D., Sean Lynn, M.D., Timothy Mc Hugh, M.D., David Martin, M.D., Warren N. Miller, M.D., Randell L. Page, D.O., Joseph L. Papiez, M.D., Andrea Thompson, M.D., Brett Troyer, M.D., Richard C. Troyer, M.D., Jim Valentine, M.D., Chris Vetsch, M.D., Michael Widmer, M.D., And Steven Wynder, M.D.,
Defendants-Counterclaimants-Respondents.

No. 26372. | Dec. 27, 2002.

Physician brought action against professional corporation for wrongful discharge. The District Court, Fourth Judicial District, Ada County, D. Duff McKee, J., granted summary judgment for professional corporation, and physician appealed. The Supreme Court, Schroeder, J., held that: (1) physician waived objections to technical defects in termination procedure; (2) professional corporation did not tortiously interfere with contract; (3) professional corporation did not engage in intentional misrepresentation; (4) genuine issue of material fact, whether physician was eligible for public-policy exception to employment at will doctrine, precluded summary judgment on that issue; (5) physician's failure to report allegations of misconduct of another physician to state Board of Medicine did not constitute an unclean hands defense for professional corporation; and (6) physician was entitled to amend complaint to add claims for emotional distress.

Affirmed in part, reversed in part, vacated in part, and remanded.

West Headnotes (37)

[1] **Appeal and Error**
Extent of Review Dependent on Nature of Decision Appealed from

In an appeal from an order granting summary judgment, Supreme Court's standard of review is the same as the standard used by district court in ruling on a motion for summary judgment.

[2] **Judgment**
Presumptions and Burden of Proof

All allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to party opposing a summary judgment motion. Rules Civ.Proc., Rule 56(c).

10 Cases that cite this headnote

[3] **Judgment**
Existence or Non-Existence of Fact Issue

When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. Rules Civ.Proc., Rule 56(c).

11 Cases that cite this headnote

[4] **Judgment**
Presumptions and Burden of Proof

Burden of proving the absence of material facts is upon the party moving for summary judgment.

Rules Civ.Proc., Rule 56(c).

1 Cases that cite this headnote

[5] **Judgment**
Existence or Non-Existence of Fact Issue

Party moving for summary judgment is entitled to judgment when nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial. Rules Civ.Proc., Rule 56(c).

[6] **Appeal and Error**
Amended and Supplemental Pleadings
Pleading
Affected by Time of Application in General

The grant or denial of leave to amend after a responsive pleading has been filed is a matter that is within the discretion of the trial court, and is subject to reversal on appeal only for an abuse of that discretion. Rules Civ.Proc., Rule 15(a).

[7] **Appeal and Error**
Findings of Fact and Conclusions of Law

An appellate court exercises free review over a district court's conclusions of law.

[8] **Appeal and Error**
Form and Requisites in General
Appeal and Error
Points and Arguments

An appellate court will not review the actions of a district court which have not been specifically assigned as error, especially where there are no authorities cited nor argument contained in the briefs upon the question.

[9] **Appeal and Error**
Reply Briefs

An appellate court will not consider arguments raised for the first time in an appellant's reply brief.

[10] **Contracts**
Waiver

Under the law of waiver, a party to a contract generally cannot accept a benefit from a procedure or action and then claim that the procedure or act is invalid.

[11] **Health**
Adverse Employment Action; Wrongful Discharge

Physician waived objection to any technical defects in termination procedure and ratified the action of professional corporation in firing him, where physician executed purchase agreements for shareholder and partnership interests, and accepted additional consideration.

[12] **Labor and Employment**
Persons Liable

Professional corporation did not tortiously interfere with its employment contract with physician; corporation could not tortiously

interfere with its own contract.

[13] **Labor and Employment**
Definite or Indefinite Term; Employment At-Will
Labor and Employment
Termination; Cause or Reason in General

Unless an employee is hired pursuant to a contract which specifies the duration of the employment, or limits the reasons why the employee may be discharged, the employee is at-will.

2 Cases that cite this headnote

[14] **Labor and Employment**
Termination; Cause or Reason in General

An at-will employee can be terminated for any reason or no reason at all.

1 Cases that cite this headnote

[15] **Torts**
Tortfeasor as Stranger to Contract or Relationship, in General

A party cannot tortiously interfere with his own contract.

[16] **Fraud**
Elements of Actual Fraud

Actionable misrepresentation requires: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity, (5) the speaker's intent that the representation be acted upon by the hearer, (6) the hearer's ignorance of the falsity, (7) the hearer's reliance that the statement was true, (8) the hearer's right to rely on the truthfulness, and (9) the hearer's proximate injury.

1 Cases that cite this headnote

[17] **Fraud**
Existing Facts or Expectations or Promises

Physician failed to establish, for purposes of misrepresentation claim against professional corporation, that corporation did not have a present intent to act on its promises to require physicians to maintain appropriate standards of care, to maintain quality-control measures, and to enforce standards of care; promises were policy statements and statements of future conduct.

2 Cases that cite this headnote

[18] **Fraud**
Existing Facts or Expectations or Promises

An action for fraud or misrepresentation will not lie for statements of future events; the law requires the plaintiff to form his or her own conclusions regarding the occurrence of future events.

6 Cases that cite this headnote

[19] **Fraud**
Relations and Means of Knowledge of Parties

Physician failed to establish, for purposes of misrepresentation claim against professional corporation, that he relied on corporation's promises to require physicians to maintain appropriate standards of care, to maintain quality-control measures, and to enforce standards of care; physician worked for a year before signing employment agreement, and was aware that corporation was taking no action on his complaints about these issues.

reporting the falsification of medical records and the performance of unnecessary operations to bolster a physician's income.

4 Cases that cite this headnote

[20] **Labor and Employment**
Questions of Law or Fact

The determination of what constitutes public policy sufficient to protect an at-will employee from termination for whistleblowing should be considered a question of law.

[21] **Judgment**
Employees, Cases Involving

Genuine issue of material fact, whether physician's actions in reporting alleged misconduct by another physician were in furtherance of public policy, and thus subject to an exception to the doctrine of employment at will, precluded summary judgment in physician's wrongful-discharge action against professional corporation.

[22] **Labor and Employment**
Exercise of Rights or Duties; Retaliation
Labor and Employment
Refusal to Engage in Wrongdoing

In order for the public policy exception to employment at will to apply, a discharged employee must: (1) refuse to commit an unlawful act, (2) perform an important public obligation, or (3) exercise certain rights or privileges.

6 Cases that cite this headnote

[23] **Labor and Employment**
Protected Activities

Physician employees are protected under the public policy exception to the at-will doctrine for

[24] **Labor and Employment**
Protected Activities

An employee who reports wrongful conduct that is protected under the public policy exception to employment at will is protected by reporting the conduct to superiors within the company.

2 Cases that cite this headnote

[25] **Health**
Records and Duty to Report; Confidentiality in General

Statute governing reporting of violations by physicians requires licensed physicians to report, to state Board of Medicine, the conduct of other licensed physicians that violates the provisions of statute setting forth grounds for medical discipline. I.C. §§ 54-1814, 54-1818.

1 Cases that cite this headnote

[26] **Health**
Adverse Employment Action; Wrongful Discharge

Licensed physician's failure to report allegations of misconduct of another doctor in medical center to state Board of Medicine, as required by statute, did not constitute an unclean hands defense for medical center to physician's claim of wrongful termination in violation of public policy; while physician had a duty to report to Board, it was prerogative of Board itself to censure such a failure, even if failure was evidence of an intent on part of physician to coerce medical center to acquiesce to his demands. I.C. §§ 54-1814, 54-1818.

2 Cases that cite this headnote

[27] **Statutes**
Effect and Consequences
Statutes
Meaning of Language
Statutes
Existence of Ambiguity
Statutes
Construction with Reference to Other Statutes

Supreme Court interprets statutes according to the plain, express meaning of the provision in question and will resort to judicial construction only if the provision is ambiguous, incomplete, absurd, or arguably in conflict with other laws.

[28] **Statutes**
Implied Amendment

Supreme Court disfavors statutory amendment by implication absent clear, unequivocal legislative intent.

[29] **Equity**
He Who Comes Into Equity Must Come with Clean Hands

Under the equitable doctrine of unclean hands, the Supreme Court has the discretion to evaluate the relative conduct of both parties and to determine whether the party seeking equitable relief should in the light of all the circumstances be precluded from such relief.

2 Cases that cite this headnote

[30] **Appeal and Error**
Amendment Increasing Demand, or Adding Cause of Action or Defense

The denial of a plaintiff's motion to amend a complaint to add another cause of action is governed by an abuse-of-discretion standard of review. Rules Civ.Proc., Rule 15(a).

3 Cases that cite this headnote

[31] **Appeal and Error**
Amended and Supplemental Pleadings

The test for determining whether a district court abused its discretion in denying a motion to amend a pleading is: (1) whether the court correctly perceived that the issue was one of discretion, (2) whether the court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it, and (3) whether it reached its decision by an exercise of reason. Rules Civ.Proc., Rule 15(a).

1 Cases that cite this headnote

[32] **Pleading**
Statutory Provisions

The dual purposes of rule governing amendment of pleadings are to allow claims to be determined on the merits rather than technicalities, and to make pleadings serve the limited role of providing notice of the nature of the claim and the facts that are at issue. Rules Civ.Proc., Rule 15(a).

[33] **Pleading**
Sufficiency of Amendment

A court may consider whether the allegations sought to be added to a complaint state a valid claim in determining whether to grant leave to amend the complaint; a court, however, may not consider the sufficiency of evidence supporting

the claim sought to be added in determining leave to amend because that is more properly determined at the summary judgment stage. Rules Civ.Proc., Rule 15(a).

4 Cases that cite this headnote

[34] **Pleading**
New or Different Cause of Action or Defense
Pleading
Sufficiency of Amendment

Trial court abused its discretion in denying physician's motion to amend his complaint for wrongful discharge against professional corporation to include claims of intentional and negligent infliction of emotional distress, where court considered the merits of the added claims. Rules Civ.Proc., Rule 15(a).

1 Cases that cite this headnote

[35] **Damages**
Breach of Contract or Warranty
Damages
Breach of Contract

Plaintiffs may not recover for emotional distress in breach of contract cases, but punitive damages might be appropriate if the defendant's conduct is sufficiently egregious.

[36] **Damages**
Breach of Contract or Warranty

Claim for infliction of emotional distress is not prohibited any time a breach of contract claim is involved; for plaintiff to state a claim for infliction of emotional distress, the conduct complained of must arise independently of the breach of contract claim.

3 Cases that cite this headnote

[37] **Damages**
Termination in General

In wrongful discharge cases, claims of infliction of emotional distress are allowed if the facts of the case support such a claim in addition to the contractual claim.

2 Cases that cite this headnote

Attorneys and Law Firms

**560 *203 Cosho, Humphrey, Greener & Welsh, Boise, for appellant. Thomas G. Walker, Jr. argued.

Anderson, Julian & Hull, Boise, for respondents. Phillip J. Collaer argued.

Opinion

SUBSTITUTE OPINION

THE COURT'S PRIOR OPINION DATED *JUNE 12, 2002* IS HEREBY WITHDRAWN.

SCHROEDER, Justice.

ON REHEARING

This is an appeal from an award of summary judgment in favor of Medical Center Physicians *et al.* (Medical Center) against Richard V. Thomas, M.D.'s (Thomas) claim for wrongful termination.

I.

FACTUAL AND PROCEDURAL HISTORY

On August 30, 1993, Thomas entered into a probationary agreement with Medical Center to be employed as a physician. Subsequently, Thomas and Medical Center entered into an agreement in which Thomas became a

shareholder in Medical Center and a partner in Nampa Medical Dental Properties, a partnership created by Medical Center. Prior to signing the 1994 agreement, Thomas believed that he had observed certain instances of misconduct by another doctor in this department (the Doctor) and reported to administrators within Medical Center what he considered to be breaches of the standard of care. He reported that the Doctor had bartered with patients for personal gifts in exchange for medical services, performed unnecessary treatment and testing for the purpose of boosting his income, falsified medical records, and acted unprofessionally by driving his vehicle across Medical Center's lawn.

A Medical Center executive committee considered the complaints and concluded that the allegations of breach of the standard of care by the Doctor were simply differences in medical opinions. The committee concluded, however, that the allegations of bartering had occurred, constituting dishonesty, and the continuation of such would result in the Doctor being dismissed from employment with Medical Center.

Thomas treated one of the Doctor's patients in his absence, telling the patient that he did not agree with the treatment the Doctor had prescribed, and he referred the patient to a local urologist. Thomas did not notify the Doctor upon his return of the treatment he had rendered. After learning of the treatment, the Doctor presented the information to Medical Center's quality assurance committee, which admonished Thomas **561 *204 for his actions in a memo dated January 28, 1998, written by Dr. Aguilar (Aguilar). The memo criticized Thomas' conduct, specifically for the entry of information in the patient's chart that was "inflammatory." Thomas responded by telling Aguilar that he was going to report the events concerning the Doctor to individuals or entities outside the Medical Center. Aguilar asked Thomas to let Medical Center handle the situation internally.

On February 17, 1998, Thomas distributed a memo addressed to Medical Center's quality assurance committee, Medical Center's chief administrator, and the chief executive officer and president of Mercy Medical Center. In the memo Thomas defended his conduct, stating that his entries were objective, he was not "in the business of trying to protect 'one of our own' from blatant, illegal actions," and he was morally obligated to report the facts accurately. He also alleged that the Doctor had erred in the treatment of a patient without first administering a pregnancy test, resulting in miscarriage of a viable fifteen-week-old fetus. Thomas concluded the memo, stating that "[i]f these issues are left unaddressed, I guarantee a copy of this letter will also be sent to the Idaho Medical Board."

Following the February 17, 1999 memo, Aguilar informed Thomas that he and many others were very angry with Thomas for writing the memo. On February 23, 1998, less than a week after Thomas' memo was distributed, the Doctor resigned his position at Medical Center. About the same time, Thomas was interviewed by Kenneth Mallea (Mallea), legal counsel for Medical Center. Mallea reported that in his opinion, Thomas would not be satisfied until Drs. Birkland and Lynn, two other physicians at Medical center were no longer employed there.

On February 26, 1998, Birkland signed and dated a document entitled "Consent of Directors," which was a vote in favor of terminating Thomas' employment at Medical Center. On March 3, 1998, written notice of a meeting scheduled for March 5, 1998 to consider Thomas' termination was distributed to some of Medical Center's board of directors. Thomas did not receive written notice of the meeting and, although he was actually aware of the meeting, he decided not to attend upon advice of his counsel. At the meeting all directors who were present, and all of Medical Center's directors except Thomas and Dr. McKinnon, signed the "Consent of Directors" in favor of Thomas' termination. The document stated that every director of Medical Center had consented to adopt Thomas' termination without a formal meeting, in accordance with the provisions of the Idaho Professional Service Corporation Act. Thomas disputes that all members of the board consented, because he, a director at the time, did not sign the document. Medical Center's articles of incorporation contained procedural requirements for termination, requiring an affirmative vote of at least 90% of the board of directors to terminate a director's employment.

On March 7, 1998, Thomas was notified that his employment had been terminated. Thereafter, Medical Center and Thomas entered into agreements in which Medical Center bought out Thomas' stock in the corporation and his partnership interest.

Following his termination, Thomas ran advertisements in local newspapers discussing particular aspects of the dispute. On April 21, 1998, he filed a complaint against Medical Center alleging wrongful termination/retaliatory discharge, breach of contract, breach of the covenant of good faith and fair dealing, misrepresentation, a wage claim, intentional interference with an employment relationship, and interference with a prospective economic advantage. Medical Center answered and counterclaimed against Thomas for breach of contract, unjust enrichment, defamation, libel and slander per se. On October 6, 1999, Thomas filed a motion for leave to amend his complaint to include claims for intentional and negligent infliction of emotional distress and for punitive damages.

Medical Center filed a motion for partial summary judgment to which Thomas responded by filing a motion for summary judgment with respect to Medical Center's counterclaims. Both motions were heard by the district judge on December 21, 1999, and at the conclusion of the hearing the judge granted Medical Center's motion for summary **562 *205 judgment with respect to most of Thomas' claims. The judge denied Thomas' motion for summary judgment against Medical Center's counterclaims and granted Thomas's motion to amend his complaint for punitive damages, but denied the motion with respect to the addition of the emotional distress claims.

Medical Center filed a second motion for summary judgment regarding Thomas' remaining claims. Following oral argument, the district judge entered a memorandum decision granting Medical Center's motion and dismissing the remainder of Thomas' claims. Judgment was entered on March 20, 2000, and Thomas filed a timely notice of appeal.

II.

STANDARD OF REVIEW

[1] [2] [3] In an appeal from an order granting summary judgment, this Court's standard of review is the same as the standard used by the district court in ruling on a motion for summary judgment. *McDonald v. Paine,* 119 Idaho 725, 727, 810 P.2d 259, 261 (1991); *Meridian Bowling Lanes v. Meridian Athletic Ass'n, Inc.,* 105 Idaho 509, 512, 670 P.2d 1294, 1297 (1983). Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court, read in a light most favorable to the nonmoving party, demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56(c); *Badell v. Beeks,* 115 Idaho 101, 102, 765 P.2d 126, 127 (1988). In making this determination all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.,* 135 Idaho 239, 243, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dept. of Fin. v. Res. Serv. Co., Inc.,* 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

[4] [5] The burden of proving the absence of material facts is upon the moving party. *Petricevich v. Salmon River Canal Co.,* 92 Idaho 865, 868, 452 P.2d 362, 365 (1969). The adverse party, however, may not rest upon the mere allegations or denials of his pleadings, but must respond, by affidavits or as otherwise provided in this rule, setting forth specific facts showing that there is a genuine issue for trial. I.R.C.P. 56(e). Therefore, the moving party is entitled to judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial. *Badell,* 115 Idaho at 102, 765 P.2d at 127 (citing *Celotex v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

[6] "The grant or denial of leave to amend after a responsive pleading has been filed is a matter that is within the discretion of the trial court and is subject to reversal on appeal only for an abuse of that discretion." *Black Canyon Racquetball Club, Inc., v. Idaho First Nat'l Bank, N.A.,* 119 Idaho 171, 175, 804 P.2d 900, 904 (1991).

[7] "[T]his Court exercises free review over the district judge's conclusions of law." *Williamson v. City of McCall,* 135 Idaho 452, 454, 19 P.3d 766, 768 (2001).

III.

THE DISTRICT JUDGE PROPERLY GRANTED MEDICAL CENTER'S MOTION FOR SUMMARY JUDGMENT ON SOME ISSUES BUT ERRED IN GRANTING THE MOTION ON THE VIOLATION OF PUBLIC POLICY CLAIM

A. Thomas Failed To Preserve Certain Material Issues On Appeal

[8] [9] In order to be considered by this Court, the appellant is required to identify legal issues and provide authorities supporting the arguments in the opening brief. I.A.R. 35. "[T]his Court will not review the actions of the district court which have not been specifically assigned as error[,] [e]specially where there are no authorities cited **563 *206 nor argument contained in the briefs upon the question." *Taylor v. Browning,* 129 Idaho 483, 490, 927 P.2d 873, 880 (1996) (internal quotation omitted). Moreover, this Court will not consider arguments raised for the first time in the appellant's reply brief. *State v. Killinger,* 126 Idaho 737, 740, 890 P.2d 323, 326 (1995).

1. Waiver

[10] [11] Thomas argues that the procedural defects of his

termination by Medical Center and the individual directors constituted breach of contract, breach of the duty of good faith and fair dealing, violation of Idaho Code § 30-1-821, interference with an existing contract and intentional interference with a prospective economic advantage. The district judge concluded that Thomas' action in executing the March 10, 1998, purchase agreements and accepting the additional consideration paid waived any technical defects in the termination procedure and ratified the action of the corporation. Under the law of waiver, a party generally cannot accept a benefit from a procedure or action and then claim that the procedure or act is invalid. *Johnson v. Pischke,* 108 Idaho 397, 401, 700 P.2d 19, 23 (1985). The first agreement provided for Thomas' resignation as a shareholder. The second effectuated his withdrawal from the partnership and the sale of his partnership interest. Both agreements stated that Thomas' employment had been terminated, and Thomas received over $23,000 in consideration pursuant to the agreements.

The district judge also found that Thomas waived any procedural irregularities of his termination as a corporate director under Idaho Code §§ 30-1-823 and 30-1-824(4). Regardless of whether this ruling is correct, Thomas has not argued on appeal that the trial court erred in finding that he waived his rights and ratified the termination procedure. Thomas simply argues that the termination procedure was flawed.1 Even if flawed, if waived and ratified, it is effective. Because not raised on appeal, the district judge's ruling that Thomas waived and ratified the termination procedure that Medical Center used to terminate him is affirmed. *State v. Raudebaugh,* 124 Idaho 758, 763, 864 P.2d 596, 601 (1993).

The district judge ruled that Thomas' breach of contract claim was barred by waiver, and the remainder of Thomas' claims were dismissed on the merits. However, Thomas argues that the procedural irregularities (the same conduct the district judge found he waived) impacted his claims for breach of good faith and fair dealing, interference with an existing contract, and interference with an economic advantage, and Idaho Code § 30-1-821. Because these claims are barred by waiver, there was no error in dismissing them as well.

2. Employment At-Will

[12] [13] [14] The district judge ruled that Thomas was an at-will employee. "Unless an employee is hired pursuant to a contract which specifies the duration of the employment, or limits the reasons why the employee may be discharged, the employee is 'at-will.' " *Nilsson v. Mapco,* 115 Idaho 18, 22, 764 P.2d 95, 99 (Ct.App.1988). An at-will employee can be terminated for any reason or no reason at all. *Id.* On appeal, however, Thomas did not raise the issue of whether the district judge was correct in determining that he was an at-will employee, and this Court will not consider the issue on appeal. Thomas only uses the term "at-will" in passing in his opening brief, stating that "[i]f this court finds that Thomas is an employee 'at-will,' the tort of intentional interference with a prospective economic advantage is applicable to individual defendants." Thomas does not argue or present authority showing that the district court erred in finding that Thomas was an at-will employee. Thomas does state that he "could only be terminated for reasons that were deemed to be in the 'best interests' of Medical Center ... upon an affirmative vote of ninety percent (90%) of the corporate directors." This argument, however, only goes to the procedural irregularities ****564 *207** of the termination, not to whether there were substantive limitations imposed by the "best interests" clause, which would make Thomas an employee other than at-will.

[15] As to the tortious interference claim, it is clearly established that a party cannot tortiously interfere with his own contract. *Ostrander v. Farm Bureau Mut. Ins. Co. of Idaho, Inc.,* 123 Idaho 650, 654, 851 P.2d 946, 950 (1993) (citations omitted). Because Medical Center's actions with respect to Thomas concerned Thomas' employment and arose out of his employment contract, Thomas has not stated a claim for tortious interference with contract.

B. The District Judge Properly Granted Summary Judgment On The Misrepresentation Claim

[16] The waiver and ratification ruling does not bar Thomas' claim for misrepresentation because it relates to prior statements by Medical Center, not the procedural irregularities of his termination. However, the district judge properly granted summary judgment on the merits of the misrepresentation claim. Actionable misrepresentation requires: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that the representation be acted upon by the hearer; (6) the hearer's ignorance of the falsity; (7) the hearer's reliance that the statement was true; (8) the hearer's right to rely on the truthfulness; and (9) the hearer's proximate injury. *Faw v. Greenwood,* 101 Idaho 387, 389, 613 P.2d 1338, 1340 (1980).

[17] Thomas asserts that Medical Center made representations to him that: (1) Medical Center would require its physicians to perform services for its patients at the applicable standard of care; (2) Medical Center would maintain appropriate quality control measures; and (3) Medical Center would enforce the requirements that its

physicians meet the applicable standard of care. The district court ruled that the representations made were not actionable because they were: (1) policy statements; and (2) statements of future conduct.

[18] An action for fraud or misrepresentation will not lie for statements of future events. *Mitchell v. Barendregt,* 120 Idaho 837, 843, 820 P.2d 707, 713 (Ct.App.1991) (citing *Sharp v. Idaho Investment Corp.,* 95 Idaho 113, 122, 504 P.2d 386, 395 (1972)). The law requires the plaintiff to form his or her own conclusions regarding the occurrence of future events. *Id.* Thomas was required to prove by clear and convincing evidence that Medical Center had no present intention of following through on the representations he complains of at the time the statements were made in order for the statements to be actionable. Thomas presented no such evidence; therefore, the district judge's dismissal of his misrepresentation claim is affirmed.

[19] Moreover, Thomas had been working for Medical Center and making complaints about the Doctor's conduct for over a year prior to entering into the 1994 employment agreement in which the alleged misrepresentations occurred. The record demonstrates that Thomas was aware that Medical Center was taking no action as a result of his complaints, thus, Thomas has failed to demonstrate reliance on any representations made in the written contracts he signed.

C. The District Judge Erred In Granting Summary Judgment On The Wrongful Termination/Retaliatory Discharge In Violation Of Public Policy Claim

[20] The determination of what constitutes public policy sufficient to protect an at-will employee from termination for whistle blowing should be considered a question of law. *See generally Quiring v. Quiring,* 130 Idaho 560, 944 P.2d 695 (1997) (determination of what constitutes a violation of public policy in invalidating the terms of a contract is a question of law). The district judge in this case noted that once defined, the issue of whether the conduct in question violates public policy becomes an issue for the jury. The district judge found that Thomas' memo dated February 17, 1998, constituted a conditional threat, as Thomas implied that he would remain silent if Medical Center acceded to his demands. The district judge concluded ****565 *208** that such conduct "as a matter of law ... does not constitute conduct protected by the public policy exception to the at-will employment doctrine in Idaho"; thus, Thomas' conduct precluded his ability to claim public policy exception.

On appeal this Court conducts a two-part inquiry. First, the Court asks whether there is a public policy regarding reporting medical irregularities sufficient to create an exception to the employer's right to terminate an at-will employee. Second, the Court decides whether the behavior complained of by Thomas is protected under the public policy exception, and whether a jury could reasonably find that Thomas acted in a manner sufficiently in furtherance of that policy.

1. The Conduct Thomas Complained of Falls Under the Public Policy Exception

[21] [22] In order for the public policy exception to apply, the discharged employee must: (1) refuse to commit an unlawful act; (2) perform an important public obligation; or (3) exercise certain rights or privileges. *Sorensen v. Comm Tek, Inc.,* 118 Idaho 664, 668, 799 P.2d 70, 74 (1990). The public policy exception has been protected in Idaho on several occasions. *E.g., Watson v. Idaho Falls Consol. Hosps., Inc.,* 111 Idaho 44, 720 P.2d 632 (1986) (protecting participation in union activities); *Ray v. Nampa Sch. Dist. No. 131,* 120 Idaho 117, 814 P.2d 17 (1991) (protecting reports of electrical building code violations); *Hummer v. Evans,* 129 Idaho 274, 923 P.2d 981 (1996) (protecting compliance with a court issued subpoena). This Court has also indicated that the public policy exception would be applicable if an employee were discharged, for example for refusing to date her supervisor, for filing a worker's compensation claim, or for serving on jury duty. *Sorensen,* 118 Idaho at 668, 799 P.2d at 74 (citations omitted). In *Sorensen,* the Court stated that if the reported conduct constituted a statutory violation, it would be more likely fall under the protection of the public policy exception to the at-will doctrine. *Id.*

[23] Thomas asserts that a fellow doctor falsified medical records and performed unnecessary operations on patients to bolster his income. Thomas asserts that his conduct in reporting the Doctor's actions falls under the exception listed in *Sorensen* for performing an important public obligation. Granting all reasonable inferences to the nonmoving party, this Court must accept that the Doctor's conduct occurred as alleged by Thomas. Reporting such misconduct falls under the public policy exception because the conduct alleged by Thomas is unlawful and it involves the health and welfare of the public. *Crea v. FMC Corp.,* 135 Idaho 175, 178, 16 P.3d 272, 275 (2000). Employees are protected under the public policy exception to the at-will doctrine for reporting the falsification of medical records and the performance of unnecessary operations to bolster a physician's income.

2. Thomas' Conduct of Reporting the Violation Falls Within the Exception

[24] Medical Center argues that Thomas was required to report the conduct to an outside entity in order to be protected under the public policy exception. In *Crea,* the plaintiff sought protection under the public policy exception following termination of his employment by FMC. Crea argued that he was fired because he disclosed to his supervisors documents indicating that activities of FMC had caused serious contamination, including arsenic that threatened ground water. This Court concluded that "Crea's claim for wrongful discharge would fall under the public policy exception to the at-will doctrine if facts supporting the claim were established." *Id.* at 178, 16 P.3d at 275. Thus, an employee who reports wrongful conduct that is protected under the public policy exception is protected by reporting the conduct to superiors within the company.

Even if the Court were to require reporting to an outside entity, the February 17, 1998 memo was addressed to the chief executive officer and president of Mercy Medical Center. Sending the memo to the CEO of a hospital with whom Medical Center worked would satisfy any outside reporting requirement.

****566 *209** Once the court defines the public policy, whether the public policy was violated is a question for the jury. Questions of fact remain as to whether Thomas' conduct in reporting what he considered the Doctor's misconduct, and whether his writing and distribution of the February 17, 1998, memo were in furtherance of the above defined public policy. There are also questions of fact regarding whether Thomas was terminated for acting in the furtherance of the public policy.

3. Unclean Hands

[25] **[26]** Finally, Medical Center presents an "unclean hands" argument with regard to Thomas's claim for wrongful termination in violation of public policy, contending that Thomas was required to report the allegations of misconduct to the Idaho Board of Medicine under Idaho Code § 54-1818, and his failure to do so precludes his claim of discharge in violation of public policy.

Idaho Code § 54-1818 does require physicians to report violations by other physicians, but there is an ambiguity in the statute as to what violations are to be reported. The statute requires physicians to report violations of Idaho Code § 54-1810, but next to where the statute indicates that Idaho Code § 54-1810 is the appropriate provision, there are brackets containing Idaho Code § 54-1814, suggesting that it is the violation of this statute that must be reported. Compiler's notes to I.C. § 54-1818 state that the "bracketed section number ' § 54-1814' was inserted by the compiler since § 54-1810 as it related to grounds for revocation or suspension of licenses was repealed and § 54-1814 now deals with such subject matter."

[27] **[28]** This Court interprets statutes according to the plain, express meaning of the provision in question and will resort to judicial construction only if the provision is ambiguous, incomplete, absurd, or arguably in conflict with other laws. *Peasley Transfer & Storage Co. v. Smith,* 132 Idaho 732, 742, 979 P.2d 605, 615 (1999). This Court disfavors statutory amendment by implication absent clear, unequivocal legislative intent. *Wilkins v. Fireman's Fund American Life Ins. Co.,* 107 Idaho 1006, 695 P.2d 391 (1985). However, the evidence indicates that the legislature intended Idaho Code § 54-1818 to refer to Idaho Code § 54-1814. Idaho Code § 54-1818 was passed in 1976 as the reporting statute for malpractice as then defined by Idaho Code § 54-1810. Idaho Code § 54-1818 has not been amended since 1976. However, in 1977, the legislature undertook an extensive rewriting of the Idaho Medical Malpractice Act, repealing, along with many other sections, Idaho Code § 54-1810. In its place, the legislature passed Idaho Code § 54-1814, which is clearly the successor statute of Idaho Code § 54-1810 given their substantially, almost exactly, identical provisions. Also, current Idaho Code § 54-1810 merely demands that all licensed physicians take a written exam to be certified, and does not address what constitutes malpractice. Determining that Idaho Code § 54-1818 still refers to Idaho Code § 54-1810 would frustrate and almost completely nullify the effectiveness of Idaho Code § 54-1818 and the responsibility of the medical field to police itself. The compiler's notes state an accurate correction of the statute. Idaho Code § 54-1818 requires licensed physicians to report the conduct of other licensed physicians that violates the provisions of Idaho Code § 54-1814.

[29] As for Thomas's failure to report the allegations of misconduct to the Idaho Board of Medicine, the failure of Thomson to report the allegation of misconduct does not constitute a defense for the Medical Center. Under the equitable doctrine of "unclean hands," the Court has the discretion to evaluate the relative conduct of both parties and to determine whether the party seeking equitable relief should in the light of all the circumstances be precluded from such relief. *Curtis v. Becker,* 130 Idaho 378, 941 P.2d 350 (1997). While Thomas had a duty to report to the Medial Board, it is the prerogative of the Medial Board itself to censure such a failure. Thomas's failure to report

the alleged misconduct to the Medical Center Board may be evidence of an intent to coerce the Medical Center to acquiesce to his demands, but the failure to meet his responsibilities to the Medical Board is not enough to preclude him from asserting his claim of **567 *210 discharge against public policy against the Medical Center.

Issues of material fact exist regarding whether Thomas is entitled to relief for discharge in violation of public policy. He has provided sufficient evidence on the disputed issues to survive summary judgment, and the district judge's order is therefore reversed and remanded on this claim.

IV.

THE DISTRICT JUDGE ERRED IN DENYING THOMAS' MOTION TO AMEND HIS COMPLAINT TO ADD CLAIMS FOR INTENTIONAL AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Amendments to complaints in civil cases are governed by I.R.C.P. 15(a). After a responsive pleading has been filed, leave of the court or written consent of the adverse party is required. The Rule provides that "leave shall be freely given when justice so requires."

[30] [31] The denial of a plaintiff's motion to amend a complaint to add another cause of action is governed by an abuse of discretion standard of review. *Raedlein v. Boise Cascade Corp.,* 129 Idaho 627, 631, 931 P.2d 621, 625 (1996). The test for determining whether the district court abused its discretion is: (1) whether the court correctly perceived that the issue was one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether it reached its decision by an exercise of reason. *Highland Enter., Inc., v. Barker,* 133 Idaho 330, 343, 986 P.2d 996, 1009 (1999) (citations omitted).

In *Idaho Schools for Equal Education Opportunity v. Idaho State Board of Education,* 128 Idaho 276, 284, 912 P.2d 644, 652 (1996), this Court found that the trial court abused its discretion in denying the plaintiff's motion to amend the complaint without articulating a reason for the denial. In that case, this Court wrote that under Rule 15(a):

> [i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, [the plaintiff] ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason-such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of the amendment, etc.-the leave sought should, as the rules require, "be freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the [d]istrict [c]ourt, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion....

Id. (quoting *Clark v. Olsen,* 110 Idaho 323, 326, 715 P.2d 993, 996 (1986)).

[32] [33] The dual purposes of Rule 15(a) are to allow claims to be determined on the merits rather than technicalities and to make pleadings serve the limited role of providing notice of the nature of the claim and the facts that are at issue. *Christensen Family Trust v. Christensen,* 133 Idaho 866, 871, 993 P.2d 1197, 1202 (1999) (citation omitted). A court may consider whether the allegations sought to be added to the complaint state a valid claim in determining whether to grant leave to amend the complaint. *Black Canyon Racquetball Club, Inc., v. Idaho First Nat'l Bank N.A.,* 119 Idaho 171, 175, 804 P.2d 900, 904 (1991). A court, however, may not consider the sufficiency of evidence supporting the claim sought to be added in determining leave to amend because that is more properly determined at the summary judgment stage. *Christensen Family Trust,* 133 Idaho at 872, 993 P.2d at 1203.

[34] Thomas sought to amend his complaint to add claims for intentional infliction of emotional distress and negligent infliction of emotional distress. In denying Thomas leave to amend his complaint, the district judge, regarding Medical Center's conduct that Thomas alleged, wrote: "It doesn't seem to me that any of that reaches anywhere **568 *211 near the level of outrage that would be necessary to give rise to a separate cause of action for emotional distress." This language indicates that the district judge considered the merits of the emotional distress claims in denying leave to add such claims.

The district judge also wrote, however: "And I can't see that the separate claims of emotional distress and tortious infliction of emotional distress go anyplace. If they're

within the reach of contract damages so be it. But there is not a basis to convert what is a contract action into a tort action for emotional distress."

[35] Medical Center contends that the district judge properly denied leave to amend because Thomas was improperly attempting to litigate a contract claim in tort because wrongful discharge sounds in contract, not in tort. *Hummer,* 129 Idaho at 280-81, 923 P.2d at 987-88. In Idaho, plaintiffs may not recover for emotional distress in breach of contract cases, but punitive damages might be appropriate if the defendant's conduct is sufficiently egregious. *Brown v. Fritz,* 108 Idaho 357, 362, 699 P.2d 1371, 1376 (1985).

[36] [37] However, a claim for infliction of emotional distress is not prohibited any time a breach of contract claim is involved. In order for the plaintiff to state a claim for infliction of emotional distress, the conduct complained of must arise independently of the breach of contract claim. *Taylor v. Herbold,* 94 Idaho 133, 138, 483 P.2d 664, 669 (1971). In wrongful discharge cases, claims of infliction of emotional distress are allowed if the facts of the case support such a claim in addition to the contractual claims. *See, e.g., Olson v. EG & G Idaho, Inc.,* 134 Idaho 778, 783-84, 9 P.3d 1244, 1249-50 (2000). In *Olson,* this Court upheld a jury verdict in favor of the defendant employer on an emotional distress claim arising from an employee's termination. *Id.*

Bearing in mind the policy behind Rule 15(a), this Court finds that the district judge acted outside the bounds of discretion in denying Thomas' motion to amend.

V.

THE AWARD OF COSTS AND ATTORNEY'S FEES IS VACATED

Because this Court reverses and remands for further proceedings on the termination in violation of public policy and denial of leave to amend the complaint, we vacate the award of costs and fees below, reserving the issue for later determination by the trial court.

VI.

NEITHER PARTY IS ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS ON APPEAL

Idaho Code § 12-120(3) provides for mandatory attorney fees on appeal and at trial to the prevailing party in disputes involving contracts for services. The present case involves a dispute relating to an employment relationship, which is inherently contractual in nature. In addition, most of Thomas' claims sounded in contract. However, because we remand for further proceedings, neither party is the prevailing party and the issue of fees is remanded for consideration at the conclusion of the case.

VII.

CONCLUSION

The district judge's order of summary judgment on the claim for wrongful discharge in violation of public policy is reversed and remanded for further proceedings. The case is also remanded to allow Thomas to amend his complaint to add claims for intentional and negligent infliction of emotional distress. The award of costs and attorney fees is vacated and remanded for consideration at the conclusion of the case. No attorney fees are awarded on appeal. The appellant is awarded costs.

Chief Justice TROUT, Justices WALTERS and KIDWELL, and Justice Pro Tem MELANSON concur.

Parallel Citations

61 P.3d 557

Footnotes

1 Thomas argues in his reply brief that the agreements only affected Thomas' status as shareholder and as a partner, not as a former employee. This Court, however, will not consider arguments raised for the first time in the appellant's reply brief. *Raudebaugh,* 124 Idaho at 763, 864 P.2d at 601.

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105 S.Ct. 613
Supreme Court of the United States

TRANS WORLD AIRLINES, INC., Petitioner,
v.
Harold H. THURSTON et al.
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, Petitioner,
v.
Harold H. THURSTON et al.

Nos. 83–997, 83–1325. | Argued Oct. 9, 1984. | Decided Jan. 8, 1985.

In suit brought against airline by labor union and in suit brought by certain employees, appeal was taken from District Court judgments, and the Court of Appeals, 713 F.2d 940,affirming in part and reversing in part, 547 F.Supp. 1221, held that the airline was liable for "liquidated" or double damages for "willful" violation of the Age Discrimination in Employment Act. Airline sought writ of certiorari and labor union filed cross petition raising only the liability issue. The Supreme Court, Justice Powell, held that: (1) the airline's transfer policy discriminated against disqualified captains on basis of age; (2) age was not a "bona fide occupational qualification"; and (3) the discriminatory transfer policy was not part of a "bona fide seniority system"; and (4) to say that violation of Age Discrimination in Employment Act is "willful" if employer either knew or showed reckless disregard for matter of whether its conduct was prohibited by the ADEA was acceptable way to articulate definition of "willful," but where employer certainly did not know that its conduct violated the Act nor could it be said that employer adopted transfer policy in "reckless disregard" of requirements of the Act, but, rather, record made clear that employer's officers acted reasonably and in good faith in attempting to determine whether their plan would violate Act, conduct was not "willful" and respondents were not entitled to liquidated damages.

Affirmed as to violation of the ADEA, and reversed as to claim for double damages.

West Headnotes (17)

[1] Federal Courts
Certiorari in general

Prevailing party may advance any ground in Supreme Court in support of a judgment in his favor, but an argument that would modify judgment cannot be presented unless cross petition has been filed.

16 Cases that cite this headnote

[2] Civil Rights
Practices prohibited or required in general; elements

Age Discrimination in Employment Act broadly prohibits arbitrary discrimination in the workplace based on age. Age Discrimination in Employment Act of 1967, §§ 2 et seq., 4(a), (a)(1),(c), (f)(1, 2), as amended, 29 U.S.C.A. §§ 621 et seq., 623(a), (a)(1), (c), (f)(1, 2).

22 Cases that cite this headnote

[3] Civil Rights
Pilots; airlines and other carriers

Where many airline captains who obtained positions as flight engineers to avoid compulsory retirement at age 60 were forced to assume that position prior to reaching 60, they were adversely affected by discriminatory transfer policy, which did not apply to captains disqualified for reasons other than age; despite fact they obtained positions as flight engineers and employer's discriminatory transfer policy could violate Age Discrimination in Employment Act even though 83% of the 60-year-old captains were able to obtain positions as flight engineers through bidding procedures. Age Discrimination in Employment Act of 1967, § 2 et seq., as amended, 29 U.S.C.A. § 621 et seq.
39 Cases that cite this headnote

[4] Civil Rights
Pilots; airlines and other carriers

Where employer, an airline, granted some disqualified captains the "privilege" of "bumping" less senior flight engineers, it could not deny such opportunity to others because of their age, and where captains who became disqualified for any reason other than age were allowed to "bump" less senior flight engineers, airline's transfer policy was discriminatory on its face. Age Discrimination in Employment Act of 1967, §§ 2 et seq., 4(a)(1), (c), (f)(1, 2), as amended, 29 U.S.C.A. §§ 621 et seq., 623(a)(1), (c), (f)(1, 2).

56 Cases that cite this headnote

[5] **Statutes**
Construction with Reference to Other Statutes

Because substantive provisions of Age Discrimination in Employment Act were derived in haec verba from equal employment opportunity sections of the Civil Rights Act of 1964, interpretation of Title VII as providing that benefit which is part and parcel of employment relationship may not be doled out in discriminatory fashion even if employer would be free not to provide the benefit at all applies with equal force in context of age discrimination. Age Discrimination in Employment Act of 1967, §§ 2 et seq., 4(a)(1), (c), (f)(1, 2), as amended, 29 U.S.C.A. §§ 621 et seq., 623(a)(1), (c), (f)(1, 2); Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
118 Cases that cite this headnote

[6] **Civil Rights**
Age discrimination

Shifting burdens of proof set forth in *McDonnell Douglas* were designed to assure that plaintiff have his day in court despite unavailability of direct evidence of employment discrimination, and where, in suit under Age Discrimination in Employment Act, there was direct evidence that method of transfer available to disqualified captain depended upon his age, in suit under Age Discrimination in Employment Act, *McDonnell Douglas* test was not applicable. Age Discrimination in Employment Act of 1967, §§ 2 et seq., 4(a)(1), (c), (f)(1, 2), as amended, 29 U.S.C.A. §§ 621 et seq., 623(a)(1), (c), (f)(1, 2); Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
564 Cases that cite this headnote

[7] **Civil Rights**
Practices prohibited or required in general; elements

To be permissible under "bona fide occupational qualification" provision of the Age Discrimination in Employment Act, age-based discrimination must relate to "particular business." Age Discrimination in Employment Act of 1967, § 4(f)(1, 2), as amended, 29 U.S.C.A. § 623(f)(1, 2).

4 Cases that cite this headnote

[8] **Civil Rights**
Pilots; airlines and other carriers

Where under airline's policy age-disqualified captains were not given transfer privileges afforded captains disqualified for other reasons, and where such policy did not operate to exclude protected individuals from position of captain but rather prevented qualified 60-year-olds from working as flight engineers, and where it was "particular" job of flight engineer from which respondents were excluded by discriminatory transfer policy, age under 60 was not a bona fide occupational qualification for position of flight engineer and the age-based discrimination at issue could not be justified. Age Discrimination in Employment Act of 1967, § 4(f)(1, 2), as amended, 29 U.S.C.A. § 623(f)(1, 2).

54 Cases that cite this headnote

[9] **Civil Rights**
Pilots; airlines and other carriers

Although Age Discrimination in Employment Act did not prohibit airline from retiring all

disqualified captains, including those incapacitated because of age, airline was not thereby authorized to make dependent upon age of individuals the availability of transfer to position for which age was not bona fide occupational qualification. Age Discrimination in Employment Act of 1967, § 4(f)(1, 2), as amended, 29 U.S.C.A. § 623(f)(1, 2); Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
1 Cases that cite this headnote

[10] Civil Rights
Defenses in general

Where although Federal Aviation Administration "age 60 rule" might have caused respondents' retirement the airline's seniority plan certainly "permitted" it within meaning of the Age Discrimination in Employment Act, and where captains disqualified for reasons other than age were allowed to "bump" less senior flight engineers, mandatory retirement was age based, and the "bona fide seniority system" defense was unavailable to airline. Age Discrimination in Employment Act of 1967, § 4(f)(1, 2), as amended, 29 U.S.C.A. § 623(f)(1, 2).

10 Cases that cite this headnote

[11] Civil Rights
Age discrimination

Legislative history of the Age Discrimination in Employment Act indicates that Congress intended for liquidated damages to be punitive in nature. Age Discrimination in Employment Act of 1967, § 7(b), as amended, 29 U.S.C.A. § 626(b); Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

76 Cases that cite this headnote

[12] Statutes
Construction with Reference to Other Statutes

As to imposition of penalty under Age Discrimination in Employment Act, manner in which correlative provision of the Fair Labor Standards Act has been interpreted is relevant. Age Discrimination in Employment Act of 1967, § 7(b), as amended, 29 U.S.C.A. § 626(b); Fair Labor Standards Act of 1938, § 16(a, b), 29 U.S.C.A. § 216(a, b).

2 Cases that cite this headnote

[13] Civil Rights
Age discrimination

Want of intention on the part of employer to violate Age Discrimination in Employment Act does not necessarily make double damages inappropriate. Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(a).

36 Cases that cite this headnote

[14] Civil Rights
Age discrimination

In view of legislative history of liquidated damages provision of the Age Discrimination in Employment Act, "reckless disregard" standard for imposition is reasonable. Age Discrimination in Employment Act of 1967, § 7(b), as amended, 29 U.S.C.A. § 626(b); Fair Labor Standards Act of 1938, § 16(a, b), 29 U.S.C.A. § 216(a, b).

88 Cases that cite this headnote

[15] Civil Rights
Age discrimination

Liquidated damages provision of Age Discrimination in Employment Act would not be interpreted in manner frustrating congressional intention for two-tiered liability scheme, and violation of the Act was not to be held "willful" merely because employer simply knew of potential applicability of the Act. Portal-to-Portal Act of 1947, §§ 6(a), 11, 29 U.S.C.A. §§ 255(a),

260; Age Discrimination in Employment Act of 1967, § 7(b), as amended, 29 U.S.C.A. § 626(b).

207 Cases that cite this headnote

[16] **Civil Rights**
⇐Age discrimination
Statutes
⇐Construction with Reference to Other Statutes

Penalty provision of the Age Discrimination in Employment Act does not incorporate Portal-to-Portal Act amendment of Fair Labor Standards Act enforcement provision, but same concerns are reflected in the proviso to the penalties provision of the ADEA; disagreeing with *Hays v. Republic Steel Corp.*, 531 F.2d 1307. Portal-to-Portal Act of 1947, § 11, 29 U.S.C.A. § 260; Age Discrimination in Employment Act of 1967, § 7(b), as amended, 29 U.S.C.A. § 626(b).

47 Cases that cite this headnote

[17] **Civil Rights**
⇐Age discrimination

To say that violation of Age Discrimination in Employment Act is "willful" if employer either knew or showed reckless disregard for matter of whether its conduct was prohibited by the ADEA was acceptable way to articulate definition of "willful," but where employer certainly did not know that its conduct violated the Act nor could it be said that employer adopted transfer policy in "reckless disregard" of requirements of the Act, but, rather, record made clear that employer's officers acted reasonably and in good faith in attempting to determine whether their plan would violate Act, conduct was not "willful" and respondents were not entitled to liquidated damages. Portal-to-Portal Act of 1947, § 11, 29 U.S.C.A. § 260; Age Discrimination in Employment Act of 1947, § 7(b), as amended, 29 U.S.C.A. § 626(b); Railway Labor Act, § 6, 45 U.S.C.A. § 156.

674 Cases that cite this headnote

111 **616 *Syllabus*

The Age Discrimination in Employment Act (ADEA) was amended in 1978 to prohibit the mandatory retirement of a protected employee because of his age. Concerned that its retirement policy, at least as it applied to flight engineers, violated the ADEA, petitioner Trans World Airlines (TWA) adopted a plan permitting any employee in "flight engineer status" at age 60 to continue working in that capacity. The plan, however, does not give 60-year-old captains (pilots) the right automatically to begin training as flight engineers. Instead, a captain may remain with the airline only if he has been able to obtain "flight engineer status" through the bidding procedures outlined in the collective-bargaining agreement between TWA and petitioner Air Line Pilots Association (ALPA). These procedures require a captain, prior to his 60th birthday, to submit a "standing bid" for the position of flight engineer. When a vacancy occurs, it is assigned to the most senior captain with a standing bid. If no vacancy occurs prior to his 60th birthday, or if he lacks sufficient seniority to bid successfully for those vacancies that do occur, the captain is retired. Under the collective-bargaining agreement, a captain displaced for any reason besides age need not resort to the bidding procedure. For example, a captain who is medically disabled or whose position is eliminated due to reduced manpower may displace automatically, or "bump," a less senior flight engineer. Respondent former TWA captains (hereafter respondents) were retired upon reaching age 60. Each was denied an opportunity to "bump" a less senior flight engineer. Two of them were forced to retire before TWA adopted its new plan and thus were denied an opportunity to become flight engineers through the bidding procedures. The third filed a standing bid for the position of flight engineer but no vacancies occurred prior to his 60th birthday, and he too was forced to retire. Respondents filed an action against TWA and ALPA in Federal District Court, claiming that TWA's transfer policy violated § 4(a)(1) of the ADEA—which proscribes differential treatment of older **617 workers "with respect to ... [a] privileg[e] of employment"—because, while it allowed captains displaced for reasons *112 other than age to "bump" less senior flight engineers, it did not allow the same "privilege of employment" to captains compelled to vacate their positions upon reaching age 60. The District Court entered summary judgment in favor of TWA and ALPA, holding that respondents had failed to establish a prima facie case of age discrimination under the test set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668, and that the affirmative defenses provided by

§ 4(f)(1)—an employer may take "any action otherwise prohibited" where age is a "bona fide occupational qualification [BFOQ]"—and § 4(f)(2)—it is not unlawful for an employer to adopt a "bona fide seniority system"—of the ADEA justified TWA's transfer policy. The Court of Appeals reversed, holding that the *McDonnell Douglas* test was inapposite because respondents had adduced *direct* proof of age discrimination; that TWA was required by § 4(a)(1) to afford 60-year-old captains the same "privilege of employment," *i.e.*, "bumping" less senior flight engineers, allowed captains disqualified for reasons other than age; that the affirmative defenses of the ADEA did not justify TWA's discriminatory transfer policy; and that TWA was liable for "liquidated" or double damages under § 7(b) of the ADEA, because its violation of the ADEA was "willful" within the meaning of that section.

Held:

1. TWA's transfer policy denies 60-year-old captains a "privilege of employment" on the basis of age in violation of § 4(a)(1) of the ADEA. Captains disqualified because of age are not afforded the same "bumping" privilege as captains disqualified for reasons other than age, but instead must resort to the bidding procedures. While the ADEA does not require TWA to grant transfer privileges to disqualified captains, nevertheless, if it does grant some disqualified captains the "privilege" of "bumping" less senior flight engineers, it may not deny the opportunity to others because of their age. The *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination. Here, there is direct evidence that the transfer method available to a captain depends on his age. Since it allows captains disqualified for any reason other than age to "bump" less senior flight engineers, TWA's transfer policy is discriminatory on its face. Pp. 621–622.

2. The affirmative defenses provided by §§ 4(f)(1) and (2) do not support the argument that TWA's discriminatory transfer policy is justified. The BFOQ defense is meritless because age is not a BFOQ for the position of flight engineer. Nor can TWA's policy be viewed as part of a bona fide seniority system. A system that includes this discriminatory transfer policy permits the forced retirement of captains on the basis of age. Pp. 622–623.

***113** 3. TWA's violation of the ADEA was not willful within the meaning of § 7(b), and therefore respondents are not entitled to "liquidated" or double damages. A violation is "willful" within the meaning of § 7(b) if the employer knew its conduct was prohibited by the ADEA or showed a "reckless disregard" for whether it was prohibited, but not if the employer simply knew of the potential applicability of the ADEA or that ADEA was "in the picture." The latter broad standard would result in an award of double damages in almost every case. TWA certainly did not "know" that its conduct violated the ADEA. Nor can it fairly be said that the TWA adopted its transfer policy in "reckless disregard" of the ADEA's requirements. The record makes clear that TWA officials acted reasonably and in good faith in attempting to determine whether their policy would violate the ADEA. Pp. 623–626.

713 F.2d 940 (CA2), affirmed in part and reversed in part.

Attorneys and Law Firms

Henry J. Oechler, Jr., argued the cause for petitioner in No. 83-997. With him on the briefs were *Donald I. Strauber* and *Peter N. Hillman.* ****618** *Michael E. Abram* argued the cause and filed briefs for the Air Line Pilots Association, International, as petitioner in No. 83-1325 and respondent in No. 83-997.

Deputy Solicitor General Wallace argued the cause for respondent Equal Employment Opportunity Commission in both cases. With him on the briefs were *Solicitor General Lee, Harriet S. Shapiro, Johnny J. Butler,* and *Philip B. Sklover. Raymond C. Fay* argued the cause in both cases and filed a brief for respondents Thurston et al. With him on the briefs were *Alan M. Serwer* and *Susan D. Goland.*†

† Briefs of *amici curiae* urging reversal were filed for the Equal Employment Advisory Council by *Robert E. Williams, Douglas S. McDowell,* and *Thomas R. Bagby;* and for the Chamber of Commerce of the United States by *Stephen A. Bokat* and *Robin S. Conrad.*

Robert M. Weinberg, Jeremiah A. Collins, and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

Edward L. Foote and *Edward J. Wendrow* filed a brief for United Airlines, Inc., as *amicus curiae.*

Opinion

***114** Justice POWELL delivered the opinion of the Court.

Trans World Airlines, Inc. (TWA), a commercial airline, permits captains disqualified from serving in that capacity for reasons other than age to transfer automatically to the position of flight engineer. In this case, we must decide whether the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.*, requires the airline to afford this same "privilege of

employment" to those captains disqualified by their age. We also must decide what constitutes a "willful" violation of the ADEA, entitling a plaintiff to "liquidated" or double damages.

I

A

TWA has approximately 3,000 employees who fill the three cockpit positions on most of its flights.[1] The "captain" is the pilot and controls the aircraft. He is responsible for all phases of its operation. The "first officer" is the copilot and assists the captain. The "flight engineer" usually monitors a side-facing instrument panel. He does not operate the flight controls unless the captain and the first officer become incapacitated.

In 1977, TWA and the Air Line Pilots Association (ALPA) entered into a collective-bargaining agreement, under which every employee in a cockpit position was required to retire when he reached the age of 60. This provision for mandatory retirement was lawful under the ADEA, as part of a "bona fide seniority system." See *United Air Lines, Inc. v. McMann,* 434 U.S. 192, 98 S.Ct. 444, 54 L.Ed.2d 402 (1977). On April 6, 1978, however, the Act was amended to prohibit the mandatory retirement of a protected individual because of his age.[2] TWA officials ***115** became concerned that the company's retirement policy, at least as it applied to flight engineers, violated the amended ADEA.[3]

On July 19, 1978, TWA announced that the amended ADEA prohibited the forced retirement of flight engineers at age 60. The company thus proposed a new policy, under which employees in all three cockpit positions, upon reaching age 60, would be allowed to continue working as flight engineers. TWA stated that it would not implement its new policy until it "had the benefit of [ALPA's] views."[4] ALPA's views were not long in coming. The Union contended that the collective-bargaining agreement prohibited the employment of a flight engineer after his 60th birthday and that the proposed change was not required by the recently amended ADEA.

Despite opposition from the Union, TWA adopted a modified version of its proposal.[5] ****619** Under this plan, any employee in "flight engineer status" at age 60 is entitled to continue ***116** working in that capacity. The new plan, unlike the initial proposal, does not give 60-year-old captains[6] the right automatically to begin training as flight engineers. Instead, a captain may remain with the airline only if he has been able to obtain "flight engineer status" through the bidding procedures outlined in the collective-bargaining agreement. These procedures require a captain, prior to his 60th birthday, to submit a "standing bid" for the position of flight engineer. When a vacancy occurs, it is assigned to the most senior captain with a standing bid. If no vacancy occurs prior to his 60th birthday, or if he lacks sufficient seniority to bid successfully for those vacancies that do occur, the captain is retired.[7]

Under the collective-bargaining agreement, a captain displaced for any reason besides age need not resort to the bidding procedures. For example, a captain unable to maintain the requisite first-class medical certificate, see 14 CFR § 67.13 (1984), may displace automatically, or "bump," a less senior flight engineer.[8] The medically disabled captain's ability to bump does not depend upon the availability of a vacancy.[9] Similarly, a captain whose position is eliminated due to reduced manpower needs can "bump" a less senior ***117** flight engineer.[10] Even if a captain is found to be incompetent to serve in that capacity, he is not discharged,[11] but is allowed to transfer to a position as flight engineer without resort to the bidding procedures.[12]

Respondents Harold Thurston, Christopher J. Clark, and Clifton A. Parkhill, former captains for TWA, were retired upon reaching the age of 60. Each was denied an opportunity to "bump" a less senior flight engineer. Thurston was forced to retire on May 26, 1978, before the company adopted its new policy. Clark did not attempt to bid because TWA had advised him that bidding would not affect his chances of obtaining a transfer. These two captains thus effectively were denied an opportunity to become flight engineers through the bidding procedures. The third captain, Parkhill, did file a standing bid for the position of flight engineer. No vacancies occurred prior to Parkhill's 60th birthday, however, and he too was forced to retire.

****620 B**

Thurston, Clark, and Parkhill filed this action against TWA and ALPA in the United States District Court for the Southern District of New York. They argued that the company's transfer policy violated ADEA § 4(a)(1), 81 Stat. 603, ***118** 29 U.S.C. § 623(a)(1). The airline allowed captains displaced for reasons other than age to "bump" less senior flight engineers. Captains compelled to vacate their positions upon reaching age 60, they claimed, should be afforded this same "privilege of employment." The Equal Employment Opportunity Commission intervened on behalf of 10 other age-disqualified captains who had been discharged as a result of their inability to displace less senior flight engineers.[13]

[1] The District Court entered a summary judgment in favor of defendants TWA and ALPA. *Air Line Pilots Assn. v. Trans World Air Lines,* 547 F.Supp. 1221 (1982). The court held that the plaintiffs had failed to establish a prima facie case of age discrimination under the test set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). None could show that at the time of his transfer request a vacancy existed for the position of flight engineer. See *id.,* at 802, 93 S.Ct., at 1824. Furthermore, the court found that two affirmative defenses justified the company's transfer policy. 29 U.S.C. §§ 623(f)(1) and (f)(2). The United States Court of Appeals for the Second Circuit reversed the District Court's judgment. 713 F.2d 940 (1983). It found the *McDonnell Douglas* formula inapposite because the plaintiffs had adduced *direct* proof of age discrimination. Captains ***119** disqualified for reasons other than age were allowed to "bump" less senior flight engineers. Therefore, the company was required by ADEA § 4(a)(1), 29 U.S.C. § 623(a)(1), to afford 60-year-old captains this same "privilege of employment." The Court of Appeals also held that the affirmative defenses of the ADEA did not justify the company's discriminatory transfer policy.[14] 713 F.2d, at 949–951. TWA was held ****621** liable for "liquidated" or double damages because its violation of the ADEA was found to be "willful." According to the court, an employer's conduct is "willful" if it "knows or shows reckless disregard for the matter of whether its conduct is prohibited by the ADEA." *Id.,* at 956. Because "TWA was clearly aware of the 1978 ADEA amendments," the Court of Appeals found the respondents entitled to double damages. *Id.,* at 956–957.

***120** TWA filed a petition for a writ of certiorari in which it challenged the Court of Appeals' holding that the transfer policy violated the ADEA and that TWA's violation was "willful." The Union filed a cross-petition raising only the liability issue. We granted certiorari in both cases, and consolidated them for argument. 466 U.S. 926, 104 S.Ct. 1706, 80 L.Ed.2d 179 (1984). We now affirm as to the violation of the ADEA, and reverse as to the claim for double damages.

II

A

[2] [3] The ADEA "broadly prohibits arbitrary discrimination in the workplace based on age." *Lorillard v. Pons,* 434 U.S. 575, 577, 98 S.Ct. 866, 868, 55 L.Ed.2d 40 (1978). Section 4(a)(1) of the Act proscribes differential treatment of older workers "with respect to ... [a] privileg[e] of employment." 29 U.S.C. § 623(a). Under TWA's transfer policy, 60-year-old captains are denied a "privilege of employment" on the basis of age. Captains who become disqualified from serving in that position for reasons other than age automatically are able to displace less senior flight engineers. Captains disqualified because of age are not afforded this same "bumping" privilege. Instead, they are forced to resort to the bidding procedures set forth in the collective-bargaining agreement. If there is no vacancy prior to a bidding captain's 60th birthday, he must retire.[15]

[4] [5] The Act does not require TWA to grant transfer privileges to disqualified captains. Nevertheless, if TWA does grant ***121** some disqualified captains the "privilege" of "bumping" less senior flight engineers, it may not deny this opportunity to others because of their age. In *Hishon v. King & Spalding,* 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), we held that "[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free ... not to provide the benefit at all." *Id.,* at 75, 104 S.Ct., at 2233–2234. This interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA "were derived *in haec verba* from Title VII." *Lorillard v. Pons, supra,* 434 U.S., at 584, 98 S.Ct., at 872.[16]

[6] TWA contends that the respondents failed to make out a prima facie case of age discrimination under *McDonnell Douglas v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), because at the time they were retired, no flight engineer vacancies existed. This argument fails, for the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence ****622** of discrimination. See *Teamsters v. United States,* 431 U.S. 324, 358, n. 44, 97 S.Ct. 1843, 1866, n. 44, 52 L.Ed.2d 396 (1977). The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the "plaintiff [has] his day in court despite the unavailability of direct evidence." *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1014 (CA1 1979). In this case there is direct evidence that the method of transfer available to a disqualified captain depends upon his age. Since it allows captains who become disqualified for any reason other than age to "bump" less senior flight engineers, TWA's transfer policy is discriminatory on its face. Cf. *Los Angeles Dept. of Water & Power v. Manhart,* 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (employer's policy requiring ***122** female employees to make larger contribution to pension fund than male employees is discriminatory on its face).

B

Although we find that TWA's transfer policy discriminates against disqualified captains on the basis of age, our inquiry cannot end here. Petitioners contend that the age-based transfer policy is justified by two of the ADEA's five affirmative defenses. Petitioners first argue that the discharge of respondents was lawful because age is a "bona fide occupational qualification" (BFOQ) for the position of captain. 29 U.S.C. § 623(f)(1). Furthermore, TWA claims that its retirement policy is part of a "bona fide seniority system," and thus exempt from the Act's coverage. 29 U.S.C. § 623(f)(2).

[7] Section 4(f)(1) of the ADEA provides that an employer may take "any action otherwise prohibited" where age is a "bona fide occupational qualification." 29 U.S.C. § 623(f)(1). In order to be permissible under § 4(f)(1), however, the age-based discrimination must relate to a "particular business." *Ibid.* Every court to consider the issue has assumed that the "particular business" to which the statute refers is the job from which the protected individual is excluded. In *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (CA5 1969), for example, the court considered the Title VII claim of a female employee who, because of her sex, had not been allowed to transfer to the position of switchman. In deciding that the BFOQ defense was not available to the defendant, the court considered only the job of switchman.

[8] TWA's discriminatory transfer policy is not permissible under § 4(f)(1) because age is not a BFOQ for the "particular" position of flight engineer. It is necessary to recognize that the airline has two age-based policies: (i) captains are not allowed to serve in that capacity after reaching the age of 60; and (ii) age-disqualified captains are not given the transfer privileges afforded captains disqualified for other reasons. ***123** The first policy, which precludes individuals from serving as captains, is not challenged by respondents.[17] The second practice does not operate to exclude protected individuals from the position of captain; rather it prevents qualified 60-year-olds from working as flight engineers. Thus, it is the "particular" job of flight engineer from which the respondents were excluded by the discriminatory transfer policy. Because age under 60 is not a BFOQ for the position of flight engineer,[18] the age-based discrimination at issue in this case cannot be justified by § 4(f)(1).

TWA nevertheless contends that its BFOQ argument is supported by the legislative history of the amendments to the ADEA. In 1978, Congress amended ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2), to ****623** prohibit the involuntary retirement of protected individuals on the basis of age. Some Members of Congress were concerned that this amendment might be construed as limiting the employer's ability to terminate workers subject to a valid BFOQ. The Senate proposed an amendment to § 4(f)(1) providing that an employer could establish a mandatory retirement age where age is a BFOQ. S.Rep. No. 95–493, pp. 11, 24 (1977), U.S.Code Cong. & Admin.News 1978, p. 504. In the Conference Committee, however, the proposed amendment was withdrawn because "the [Senate] conferees agreed that ... [it] neither added to nor worked any change upon present law." H.R.Conf.Rep. No. 95–950, p. 7 (1978), U.S.Code Cong. & Admin.News 1978, p. 529. The House Committee Report also indicated that an individual could be compelled to retire from a position for which age was a BFOQ. H.R.Rep. No. 95–527, pt. 1, p. 12 (1977).

[9] ***124** The legislative history of the 1978 Amendments does not support petitioners' position. The history shows only that the ADEA does not prohibit TWA from retiring all disqualified captains, including those who are incapacitated because of age. This does not mean, however, that TWA can make dependent upon the age of the individual the availability of a transfer to a position for which age is not a BFOQ. Nothing in the legislative history cited by petitioners indicates a congressional intention to allow an employer to discriminate against an older worker seeking to transfer to another position, on the ground that age was a BFOQ for his *former* job.

[10] TWA also contends that its discriminatory transfer policy is lawful under the Act because it is part of a "bona fide seniority system." 29 U.S.C. § 623(f)(2). The Court of Appeals held that the airline's retirement policy is not mandated by the negotiated seniority plan. We need not address this finding; any seniority system that includes the challenged practice is not "bona fide" under the statute. The Act provides that a seniority system may not "require or permit" the involuntary retirement of a protected individual because of his age. *Ibid.* Although the FAA "age 60 rule" may have caused respondents' retirement, TWA's seniority plan certainly "permitted" it within the meaning of the ADEA. *Ibid.* Moreover, because captains disqualified for reasons other than age are allowed to "bump" less senior flight engineers, the mandatory retirement was age-based. Therefore, the "bona fide seniority system" defense is unavailable to the petitioners.

In summary, TWA's transfer policy discriminates against protected individuals on the basis of age, and thereby violates the Act. The two statutory defenses raised by petitioners do not support the argument that this discrimination is justified. The BFOQ defense is meritless because age is not a bona fide occupational qualification for the position of flight engineer, the job from which the respondents were excluded. Nor can TWA's policy be viewed as part of a bona ***125** fide seniority system. A system that includes this discriminatory transfer policy

permits the forced retirement of captains on the basis of age.

III

A

Section 7(b) of the ADEA, 81 Stat. 604, 29 U.S.C. § 626(b), provides that the rights created by the Act are to be "enforced in accordance with the powers, remedies, and procedures" of the Fair Labor Standards Act. See *Lorillard v. Pons,* 434 U.S., at 579, 98 S.Ct., at 869. But the remedial provisions of the two statutes are not identical. Congress declined to incorporate into the ADEA several FLSA sections. Moreover, § 16(b) of the FLSA, which makes the award of liquidated damages mandatory, is significantly qualified in ADEA § 7(b) by a proviso that a prevailing plaintiff is entitled to double damages "only in cases of willful violations." 29 U.S.C. § 626(b). In this case, the Court of Appeals held that TWA's violation of the ADEA was "willful," and ****624** that the respondents therefore were entitled to double damages. 713 F.2d, at 957. We granted certiorari to review this holding.

[11] The legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature. The original bill proposed by the administration incorporated § 16(a) of the FLSA, which imposes criminal liability for a willful violation. See 113 Cong.Rec. 2199 (1967). Senator Javits found "certain serious defects" in the administration bill. He stated that "difficult problems of proof ... would arise under a criminal provision," and that the employer's invocation of the Fifth Amendment might impede investigation, conciliation, and enforcement. *Id.,* at 7076. Therefore, he proposed that "the [FLSA's] criminal penalty in cases of willful violation ... [be] eliminated and a double damage liability substituted." *Ibid.* Senator Javits argued that his proposed amendment would "furnish an effective deterrent to willful violations [of the ADEA]," *ibid.,* ***126** and it was incorporated into the ADEA with only minor modification, S. 788, 90th Cong., 1st Sess. (1967).

[12] **[13]** **[14]** This Court has recognized that in enacting the ADEA, "Congress exhibited ... a detailed knowledge of the FLSA provisions and their judicial interpretation ...." *Lorillard v. Pons, supra,* 581, 98 S.Ct., at 870. The manner in which FLSA § 16(a) has been interpreted therefore is relevant. In general, courts have found that an employer is subject to criminal penalties under the FLSA when he "wholly disregards the law ... without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law." *Nabob Oil Co. v. United States,* 190 F.2d 478, 479 (CA10), cert. denied, 342 U.S. 876, 72 S.Ct. 167, 96 L.Ed. 659 (1951); see also *Darby v. United States,* 132 F.2d 928 (CA5 1943).19 This standard is substantially in accord with the interpretation of "willful" adopted by the Court of Appeals in interpreting the liquidated damages provision of the ADEA. The court below stated that a violation of the Act was "willful" if "the employer ... knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 713 F.2d, at 956. Given the legislative history of the liquidated damages provision, we think the "reckless disregard" standard is reasonable.

The definition of "willful" adopted by the above cited courts is consistent with the manner in which this Court has interpreted the term in other criminal and civil statutes. In *United States v. Murdock,* 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381 (1933), the defendant was prosecuted under the Revenue Acts of 1926 and 1928, which made it a misdemeanor for a person "willfully" to ***127** fail to pay the required tax. The *Murdock* Court stated that conduct was "willful" within the meaning of this criminal statute if it was "marked by careless disregard [for] whether or not one has the right so to act." *Id.,* at 395, 54 S.Ct., at 225. In *United States v. Illinois Central R. Co.,* 303 U.S. 239, 58 S.Ct. 533, 82 L.Ed. 773 (1938), the Court applied the *Murdock* definition of "willful" in a civil case. There, the defendant's failure to unload a cattle car was "willful," because it showed a disregard for the governing statute and an indifference to its requirements. 303 U.S., at 242–243, 58 S.Ct., at 534–535.20

[15] **[16]** The respondents argue that an employer's conduct is willful if he is "cognizant ****625** of an appreciable possibility that the employees involved were covered by the [ADEA]." In support of their position, the respondents cite § 6 of the Portal-to-Portal Act of 1947 (PPA), 29 U.S.C. § 255(a), which is incorporated in both the ADEA and the FLSA. Section 6 of the PPA provides for a 2-year statute of limitations period unless the violation is willful, in which case the limitations period is extended to three years. 29 U.S.C. § 255(a). Several courts have held that a violation is willful within the meaning of § 6 if the employer knew that the ADEA was "in the picture." See, *e.g., Coleman v. Jiffy June Farms, Inc.,* 458 F.2d 1139, 1142 (CA5 1971), cert. denied, 409 U.S. 948, 93 S.Ct. 292, 34 L.Ed.2d 219 (1972); *EEOC v. Central Kansas Medical Center,* 705 F.2d 1270, 1274 (CA10 1983). Respondents contend that the term "willful" should be interpreted in a similar manner in applying the liquidated damages provision of the ADEA.

We are unpersuaded by respondents' argument that a violation of the Act is "willful" if the employer simply knew of the potential applicability of the ADEA. Even if the "in ***128** the picture" standard were appropriate for the

statute of limitations, the same standard should not govern a provision dealing with liquidated damages.[21] More importantly, the broad standard proposed by the respondents would result in an award of double damages in almost every case. As employers are required to post ADEA notices, it would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability. Both the legislative history and the structure of the statute show that Congress intended a two-tiered liability scheme. We decline to interpret the liquidated damages provision of ADEA § 7(b) in a manner that frustrates this intent.[22]

B

[17] As noted above, the Court of Appeals stated that a violation is "willful" if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 713 F.2d, at 956. Although we ***129** hold that this is an acceptable way to articulate a definition of "willful," the court below misapplied this standard. TWA certainly did not "know" that its conduct violated the Act. Nor can it fairly be said that TWA adopted its transfer policy in "reckless disregard" of the Act's requirements. The record makes clear that TWA officials acted reasonably and in good faith in attempting to determine whether their plan would violate the ADEA. See *Nabob Oil Co. v. United States, supra.*

Shortly after the ADEA was amended, TWA officials met with their lawyers to determine whether the mandatory retirement policy violated the Act. Concluding that the company's existing plan was inconsistent ****626** with the ADEA, David Crombie, the airline's Senior Vice President for Administration, proposed a new policy. Despite opposition from the Union, the company adopted a modified version of this initial proposal. Under the plan adopted on August 10, 1978, any pilot in "flight engineer status" on his 60th birthday could continue to work for the airline. On the day the plan was adopted, the Union filed suit against the airline claiming that the new retirement policy constituted a "major" change in the collective-bargaining agreement, and thus was barred by § 6 of the Railway Labor Act, 45 U.S.C. § 156. Nevertheless, TWA adhered to its new policy.

As evidence of "willfulness," respondents point to comments made by J.E. Frankum, the Vice President of Flight Operations. After Crombie was hospitalized in August 1978, Frankum assumed responsibility for bringing TWA's retirement policy into conformance with the ADEA. Despite legal advice to the contrary, Frankum initially believed that the company was not required to allow any pilot over 60 to work. Frankum later abandoned this position in favor of the plan approved on August 10, 1978. Frankum apparently had been concerned only about whether flight engineers could work after reaching the age of 60. There is no indication that TWA was ever advised by counsel that its new transfer policy discriminated against captains on the basis of age.

***130** There simply is no evidence that TWA acted in "reckless disregard" of the requirements of the ADEA. The airline had obligations under the collective-bargaining agreement with the Air Line Pilots Association. In an attempt to bring its retirement policy into compliance with the ADEA, while at the same time observing the terms of the collective-bargaining agreement, TWA sought legal advice and consulted with the Union. Despite opposition from the Union, a plan was adopted that permitted cockpit employees to work as "flight engineers" after reaching age 60. Apparently TWA officials and the airline's attorneys failed to focus specifically on the effect of each aspect of the new retirement policy for cockpit personnel. It is reasonable to believe that the parties involved, in focusing on the larger overall problem, simply overlooked the challenged aspect of the new plan.[23] We conclude that TWA's violation of the Act was not willful within the meaning of § 7(b), and that respondents therefore are not entitled to liquidated damages.

IV

The ADEA requires TWA to afford 60-year-old captains the same transfer privileges that it gives to captains disqualified for reasons other than age. Therefore, we affirm the Court of Appeals on this issue. We do not agree with its holding that TWA's violation of the Act was willful. We accordingly reverse its judgment that respondents are entitled to liquidated or double damages.

It is so ordered.

Parallel Citations

105 S.Ct. 613, 36 Fair Empl.Prac.Cas. (BNA) 977, 35 Empl. Prac. Dec. P 34,851, 83 L.Ed.2d 523, 53 BNA USLW 4024

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 On certain long-distance flights, a fourth crew member, the "international relief officer," is in the cockpit. On some types of aircraft, there are only two cockpit positions.

2 Section 2(a) of the Age Discrimination in Employment Act Amendments of 1978, Pub.L. 95–256, 92 Stat. 189, 29 U.S.C. § 623(f)(2).

3 A regulation promulgated by the Federal Aviation Administration prohibits anyone from serving after age 60 as a pilot on a commercial carrier. 14 CFR § 121.383(c) (1984). Captains and first officers are considered "pilots" subject to this regulation; flight engineers are not. Therefore, TWA officials were concerned primarily with the effect that the 1978 amendments had on the company's policy of mandatory retirement of flight engineers.

4 The proposal was announced in a letter to ALPA from David Crombie, TWA's Senior Vice President for Administration.

5 On the same date that TWA implemented its new policy, ALPA filed suit against the company. ALPA contended that TWA's action constituted a "unilateral change in working conditions," and hence was violative of the Railway Labor Act, 45 U.S.C. §§ 156–188. This action, *ALPA v. Trans World Airlines,* was consolidated with the present action in the United States District Court for the Southern District of New York. That court granted summary judgment in favor of TWA, and the Court of Appeals for the Second Circuit affirmed. It held that the new retirement policy did not constitute a "major" change in the existing terms and conditions of employment, and that the Union therefore was without a remedy in the federal courts. See 45 U.S.C. § 156.

6 The term "captain" will hereinafter be used to refer to both the positions of captain and first officer.

7 In 1980, TWA imposed an additional restriction on captains bidding for flight engineer positions. Successful bidders were required to "fulfill their bids in a timely manner." Under this amended practice, captains who bid successfully for positions as flight engineers were required to "activate" their bids immediately. As a result, many captains under age 60 were trained for and assumed flight engineer positions, with resulting lower pay and responsibility.

8 The pilot must be able to obtain the second-class medical certificate that is required for the position of flight engineer. See 14 CFR § 67.15 (1984).

9 If the disabled captain lacks sufficient seniority to displace, he is not discharged. Rather, he is entitled to go on unpaid medical leave for up to five years, during which time he retains and continues to accrue seniority.

10 Only those flight engineers in the current and last former domiciles of the displaced captain may be "bumped." If a captain has insufficient seniority to displace a flight engineer at either of these domiciles, he is not discharged. Instead, he is placed in furlough status for a period of up to 10 years, during which time he continues to accrue seniority for purposes of a recall.

11 Although the collective-bargaining agreement does not address disciplinary downgrades, TWA's Vice President of Flight Operations, J.E. Frankum, stated that such downgrades had occurred "many times over many years."

12 Captains disqualified for other reasons also are allowed to "bump" less senior flight engineers. For example, the collective-bargaining agreement provides that a captain who fails to "requalify" in that position will not be discharged.

13 Three of the EEOC claimants have settled with TWA. The remaining seven claimants are Lusk, Bobzin, Gowling, Widmayer, Humbles, Roquemore, and Lewis. Lusk and Bobzin were retired prior to August 10, 1978. Thus, like Harold Thurston, they had no way of knowing that the bidding procedures of the collective-bargaining agreement would represent a possible means of transferring to the position of flight engineer.

Gowling, Widmayer, Humbles, and Roquemore submitted standing bids for the position of flight engineer. Because no vacancies occurred prior to the time that they reached the age of 60, each was discharged.

Lewis submitted a bid and was awarded a position as flight engineer on October 31, 1979. On January 15, 1980, he was told that he would have to "fulfill his bid in a timely manner." See n. 7, *supra.* Because this would have required Lewis to assume his new position almost a year prior to his 60th birthday, he refused to appear for training. Therefore, his bid was canceled by TWA.

14 The Court of Appeals also found that ALPA had violated ADEA § 4(c), 29 U.S.C. § 623(c), which prohibits unions from causing or attempting to cause an employer to engage in unlawful discrimination. The court found, however, that ALPA was not liable for damages. It held that the ADEA does not permit the recovery of monetary damages, including backpay, against a labor organization. It noted that the ADEA incorporates the remedial scheme of the Fair Labor Standard Act, which does not allow actions against unions to recover damages. 713 F.2d, at 957.

In its petition for a writ of certiorari, TWA raised the issue of a union's liability for damages under the ADEA. Although we granted the petition in full, we now conclude that the Court is without jurisdiction to consider this question. TWA was not the proper party to present this question. The airline cannot assert the right of others to recover damages against the Union.

Both the individual respondents and the EEOC argue that the issue of union liability is properly before the Court. But the respondents failed to file a cross-petition raising this question. A prevailing party may advance any ground in support of a judgment in his favor. *Dandridge v. Williams,* 397 U.S. 471, 475 n. 6, 90 S.Ct. 1153, 1156 n. 6, 25 L.Ed.2d 491 (1970). An argument that would modify the judgment, however, cannot be presented unless a cross-petition has been filed. *FEA v. Algonquin SNG, Inc.,* 426 U.S. 548, 560, n. 11, 96 S.Ct. 2295, 2302, n. 11, 49 L.Ed.2d 49 (1976). In this case, the judgment of the Court of Appeals would be modified by the arguments advanced by the EEOC and the individual plaintiffs, as they are contending that the Union should be liable to them for monetary damages.

15 The discriminatory transfer policy may violate the Act even though 83% of the 60-year-old captains were able to obtain positions as flight engineers through the bidding procedures. See *Phillips v. Martin Marietta Corp.,* 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 (1971) (*per curiam*).

It also should be noted that many of the captains who obtained positions as flight engineers were forced to assume that position prior to reaching age 60. See n. 7, *supra.* They were adversely affected by the discriminatory transfer policy despite the fact that they obtained positions as flight engineers.

16 Several Courts of Appeals have recognized the similarity between the two statutes. In *Hodgson v. First Federal Savings & Loan Assn.,* 455 F.2d 818, 820 (1972), for example, the United States Court of Appeals for the Fifth Circuit stated that with "a few minor exceptions the prohibitions of [the ADEA] are in terms identical to those of Title VII of the Civil Rights Act of 1964."

17 In this litigation, the respondents have not challenged TWA's claim that the FAA regulation establishes a BFOQ for the position of captain. The EEOC guidelines, however, do not list the FAA's age-60 rule as an example of a BFOQ because the EEOC wishes to avoid any appearance that it endorses the rule. 29 CFR § 1625 (1984).

18 The petitioners do not contend that age is a BFOQ for the position of flight engineer. Indeed, the airline has employed at least 148 flight engineers who are over 60 years old.

19 Courts below have held that an employer's action may be "willful," within the meaning of § 16(a) of the FLSA, even though he did not have an evil motive or bad purpose. See *Nabob Oil Co. v. United States.* We do not agree with TWA's argument that unless it intended to violate the Act, double damages are inappropriate under § 7(b) of the ADEA. Only one Court of Appeals has expressed approval of this position. See *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1020, n. 27 (CA1 1979).

20 The definition of "willful" set forth in *Murdock* and *Illinois Central* has been applied by courts interpreting numerous other criminal and civil statutes. See, e.g., *Alabama Power Co. v. FERC,* 584 F.2d 750 (CA5 1978); *F.X. Messina Construction Corp. v. Occupational Safety & Health Review Comm'n,* 505 F.2d 701 (CA1 1974).

21 The Courts of Appeals are divided over whether Congress intended the "willfulness" standard to be identical for determining liquidated damages and for purposes of the limitations period. Compare *Spagnuolo v. Whirlpool Corp.,* 641 F.2d 1109, 1113 (CA4) (standards are identical), cert. denied, 454 U.S. 860, 102 S.Ct. 316, 70 L.Ed.2d 158 (1981), with *Kelly v. American Standard, Inc.,* 640 F.2d 974, 979 (CA9 1981) (standards are different).

22 The "in the picture" standard proposed by the respondents would allow the recovery of liquidated damages even if the employer acted reasonably and in complete "good faith." Congress hardly intended such a result.

The Court interpreted the FLSA, as originally enacted, as allowing the recovery of liquidated damages any time that there was a violation of the Act. See *Overnight Motor Transportation Co. v. Missel,* 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942). In response to its dissatisfaction with that harsh interpretation of the provision, Congress enacted the Portal-to-Portal Act of 1947. See *Lorillard v. Pons,* 434 U.S. 575, 581–582, n. 8, 98 S.Ct. 866, 870, n. 8, 55 L.Ed.2d 40 (1978). Section 11 of the PPA, 29 U.S.C. § 260, provides the employer with a defense to a mandatory award of liquidated damages when it can show good faith and reasonable grounds for believing it was not in violation of the FLSA. Section 7(b) of the ADEA does not incorporate § 11 of the PPA, contra, *Hays v. Republic Steel Corp.,* 531 F.2d 1307 (CA5 1976). Nevertheless, we think that the same concerns are reflected in the proviso to § 7(b) of the ADEA.

23 In his dissent, Judge Van Graafeiland also focused on the larger problem, rather than on the discriminatory transfer policy. Judge Van Graafeiland stated: "TWA is the only trunk airline that voluntarily has permitted [persons] ... over 60 to continue working as flight engineers. Instead of receiving commendation for what it has done, TWA is held liable as a matter of law for age discrimination," 713 F.2d, at 957.

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24 Fed.Appx. 801
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)
United States Court of Appeals, Ninth Circuit.

Vernon TROY, a married man, Plaintiff-Appellant,
v.
STANDARD INSURANCE COMPANY, an Oregon corporation, Defendant-Appellee.

No. 00-35459. | D.C. No. CV-99-05314-FDB. | Argued and Submitted Nov. 9, 2001. | Decided Dec. 20, 2001.

Former employee brought action against his former employer, alleging employer violated the Age Discrimination in Employment Act (ADEA). The United States District Court for the Western District of Washington, Franklin D. Burgess, J., 2000 WL 502829, granted summary judgment in favor of employer, and employee appealed. The Court of Appeals held that genuine issue of material fact existed as to whether employer's legitimate, nondiscriminatory reason for terminating employee was pretext for discrimination, precluding summary judgment.

Reversed and remanded.

West Headnotes (5)

[1] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Employees need offer very little evidence of employment discrimination in order to defeat an employer's motion for summary judgment, because the ultimate question of determining the reason for the employer's actions requires a searching inquiry, one that is most appropriately conducted by a factfinder, upon a full record.

[2] **Civil Rights**
Effect of Prima Facie Case; Shifting Burden

Under the *McDonnell Douglas* burden-shifting framework for an employment discrimination claim: (1) the plaintiff must make a prima facie case of discrimination; (2) the burden of production, but not persuasion, then shifts to the defendant to offer a legitimate, nondiscriminatory reason for the action taken against the plaintiff; and then (3) the plaintiff must prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

[3] **Civil Rights**
Prima Facie Case
Federal Civil Procedure
Employees and Employment Discrimination, Actions Involving

The burden of making a prima facie case of employment discrimination under *McDonnell Douglas* is not onerous, and only minimal proof is required to survive summary judgment.

[4] **Civil Rights**
Practices Prohibited or Required in General; Elements

The plaintiff establishes a prima facie case of discrimination under the ADEA by showing: (1) membership in a protected class, namely that he is at least 40 years old; (2) he was qualified for the position; (3) he was subjected to an adverse employment action; and (4) he was treated less

favorably than similarly situated individuals outside of the protected class. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[5] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Genuine issue of material fact existed as to whether former employer's legitimate, nondiscriminatory reason for terminating employee was pretext for discrimination, precluding summary judgment for employer in employee's action alleging violation of the ADEA. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

*802 Appeal from the United States District Court for the Western District of Washington, Franklin D. Burgess, District Judge, Presiding.

Before B. FLETCHER, McKEOWN, and TALLMAN, Circuit Judges.

Opinion

MEMORANDUM*

Vernon Troy, a former sales representative for Standard Insurance Company, appeals the summary judgment in favor of the employer in a claim brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a). We have jurisdiction under 28 U.S.C. § 1291. We review the award of summary judgment *de novo, Devereaux v. Abbey,* 263 F.3d 1070, 1074 (9th Cir.2001), and we reverse. Because the parties are familiar with the factual background, we do not recite the details here.

[1] The district court did not have the benefit of the Supreme Court's decision in *Reeves v. Sanderson Plumbing Prod., Inc.,* 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), at the time of its decision. *Reeves* requires that we reverse the summary judgment in favor of Standard and remand for trial. Employees need offer "very little evidence" of discrimination in order to defeat an employer's motion for summary judgment, *Chuang v. Univ. of Cal. Davis,* 225 F.3d 1115, 1124 (9th Cir.2000), because the ultimate question of determining the reason for the employer's actions requires a "searching inquiry-one that is most appropriately conducted by a factfinder, upon a full record." *Schnidrig v. Columbia Mach., Inc.,* 80 F.3d 1406, 1410 (9th Cir.1996) (quoting *Lam v. Univ. of Haw.,* 40 F.3d 1551, 1563 (9th Cir.1994)).

*803 [2] Under the *McDonnell Douglas* burden-shifting framework (1) the plaintiff must make a prima facie case of discrimination; (2) the burden of production, but not persuasion, then shifts to the defendant to offer a "legitimate, nondiscriminatory reason" for the action taken against the plaintiff; and then (3) the plaintiff must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Reeves,* 530 U.S. at 142-43 (citations omitted).

[3] [4] The burden of making a prima facie case is "not onerous," *Lynn v. Regents of the Univ. of Cal.,* 656 F.2d 1337, 1342 (9th Cir.1981), so that only "minimal proof" is required to survive summary judgment. *Chuang,* 225 F.3d at 1124. The plaintiff establishes a prima facie case of discrimination under the ADEA by showing he (1) belongs to a protected class (he is at least 40 years old); (2) was qualified for the position; (3) was subjected to an adverse employment action; and (4) was treated less favorably than similarly situated individuals outside of the protected class. *See Wallis v. J.R. Simplot Co.,* 26 F.3d 885, 890-91 (9th Cir.1994). Troy established a prima facie case of age discrimination.

In Troy's case, the parties only dispute the second factor-whether Troy was qualified for his position as a sales representative, or, as Standard puts it, whether he satisfactorily performed his duties. Troy offered evidence that he had worked for Standard for 23 years by the time he was given the choice to resign or be fired. He received two commendations, one from Standard's President and the other from its Vice President, upon completing 20 years of service, only three years earlier. Although Standard argues that Troy's past performance is not relevant to concerns about his performance during the last few years of his service with the company, its own Vice President acknowledged that "[t]rue success is measured by long term results." Moreover, even during the last few years, Troy consistently ranked in the top half of Standard's sales representatives nationally, fared well when compared to his regional peers, and, more often than not, beat his Seattle peers, except for his former manager, Dennis Dawson.1

[5] Neither party contests that Standard met its burden in providing a legitimate, nondiscriminatory reason for

terminating Troy's performance: Troy received two successive poor evaluations and failed to meet the action plan targets. Troy, however, met his burden of offering evidence that Standard's reason was a pretext for age discrimination. As *Reeves* states, in a motion for summary judgment, courts must (1) review the record as a whole but (2) do so in favor of the nonmovant so that (3) all reasonable inferences are made on behalf of the nonmovant. 530 U.S. at 149-50.

Without the benefit of the Supreme Court's guidance in *Reeves,* the district court discounted as "innocuous" comments referring to Troy's energy level, his manner of sitting in his chair, his need to "rejuvenate" his sales approach, and the "very seasoned/tenured reps" in the Seattle office. Such comments *could be* innocuous, but they could also be a sign of a bias favoring younger sales representatives. Determining whether the comments were, in fact, innocuous or, in fact, a sign of bias belongs to the jury.

***804** Likewise, Standard may very well have had a nondiscrimatory reason for its method of allocating and reallocating territories as well as determining production targets. Nonetheless, a *reasonable* factfinder could conclude that an employer who requires its senior workers (here, workers protected by the ADEA) to meet higher production targets because of their experience/age, who simultaneously takes away the territories that the senior workers have developed over the years (and that may allow them to meet their higher production targets), and who gives those territories to less experienced/younger employees, is engaging in a practice that is inherently discriminatory. To simply say it is a business model is to avoid the question of whether that business model is discriminatory.[2]

Troy produced other evidence from which a jury could infer pretext: Troy's production targets were set much higher than his replacement's targets, even though his replacement had 17 years of experience selling insurance; Standard allowed its managers to arbitrarily assign production targets; Standard's method of evaluating sales representatives involved subjectivity that could have allowed a manager's age-related bias to affect his or her rating of an employee; Standard's failure to fire all employees who missed production targets indicates that they were not "quotas;" Garry Montag, the younger manager who put Troy on the action plan that led to his termination, engaged in questionable conduct that hurt Troy's chance of meeting his production target but was not disciplined himself; Troy's original action plan would have been virtually impossible to achieve, while his revised plan was simply one that no employee had achieved in the previous four years; and Troy's problems began in 1994 when Dawson, Troy's contemporary, accepted a demotion from manager to sales representative rather than face an action plan Dawson considered impossible to achieve.

Troy did not have to prove his case at summary judgment but rather just raise a material issue of disputed fact. *See Washington v. Garrett,* 10 F.3d 1421, 1433 (9th Cir.1993) ("If a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive, summary judgment is inappropriate, because it is for the trier of fact to decide which story is to be believed."). Looking at all the evidence presented, with the benefit of every reasonable inference, Troy has met his burden.

Summary judgment is appropriate where "no rational factfinder could conclude that the [employer's] action was discriminatory." *Reeves,* 530 U.S. at 148. This is not such a case. Because there exist material issues of fact, the district court should not have awarded summary judgment to the defendant on Troy's age discrimination claim.

REVERSED.

Parallel Citations

2001 WL 1646866 (C.A.9 (Wash.))

Footnotes

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

1 Standard's attacks on Troy's performance, especially when based on subjective factors, should not be considered during step one of the *McDonnell Douglas* analysis. *See Lynn,* 656 F.2d at 1344.

2 While Standard is correct to say that not all practices that "discriminate" among workers, even those that are patently unfair, are actionable, at the summary judgment stage, courts must draw inferences in favor of the nonmovant. Here, those inferences suggest that Standard's motivation might have represented age-related bias.

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26 F.3d 885
United States Court of Appeals, Ninth Circuit.

Gary E. WALLIS, husband; Carol Wallis, wife, Plaintiffs–Appellants,
v.
J.R. SIMPLOT COMPANY, Defendant–Appellee.

No. 92–36759. | Argued and Submitted Jan. 6, 1994. | Decided May 26, 1994. | As Amended on Denial of Rehearing July 14, 1994.

Discharged employee brought action claiming retaliatory discharge and age discrimination. The United States District Court for the District of Idaho, Marion J. Callister, Chief Judge, granted summary judgment for employer and employee appealed. The Court of Appeals, T.G. Nelson, Circuit Judge, held that summary judgment could be granted even though employee established prima facie case of discrimination where employee failed to present any evidence to refute employer's legitimate, nondiscriminatory reason for discharge.

Affirmed.

West Headnotes (5)

[1] **Federal Courts**
Time for Filing in General

Application of amended version of rule providing that when notice of appeal is prematurely filed, it shall be in abeyance, and shall become effective upon date of entry of order that disposes of last of all such motions, to appeal that was pending on effective date of rule, was "just and practicable"; appellee could not claim prejudice because it did not discover defect in notice until court ordered supplemental briefing on issue of jurisdiction after case had been set for oral argument. F.R.A.P.Rule 4(a)(4), 28 U.S.C.App.(1988 Ed.).

28 Cases that cite this headnote

[2] **Federal Civil Procedure**
Burden of Proof

Requisite degree of proof necessary to establish prima facie case for Title VII and Age Discrimination in Employment Act (ADEA) claims on summary judgment is minimal and does not even need to rise to level of preponderance of evidence; plaintiff need only offer evidence which gives rise to inference of unlawful discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

540 Cases that cite this headnote

[3] **Civil Rights**
Prima Facie Case
Civil Rights
Age Discrimination

Prima facie case for Title VII and Age Discrimination in Employment Act (ADEA) claims may be based either on presumption or on direct evidence of discriminatory intent. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

40 Cases that cite this headnote

[4] **Civil Rights**
Effect of Prima Facie Case; Shifting Burden
Civil Rights
Age Discrimination

Once prima facie case has been made under Title VII and Age Discrimination in Employment Act (ADEA), burden of production shifts to defendant, who must offer evidence that adverse action was taken for other than impermissibly discriminatory reasons; once defendant fulfills this burden of production by offering legitimate,

nondiscriminatory reason for its employment decision, presumption of unlawful discrimination drops out of picture. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

365 Cases that cite this headnote

[5] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Even though employee established prima facie case to support his retaliatory discharge and age discrimination claims, when employee then failed to present any evidence to refute employer's legitimate, nondiscriminatory reason for discharge, employee failed to establish triable issue of fact on ultimate question of whether employer intentionally discriminated or retaliated against him, and summary judgment for employer was proper. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

447 Cases that cite this headnote

Attorneys and Law Firms

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Rory R. Jones, Richard H. Greener, Cosho, Humphrey, Greener & Welsh, Boise, ID, for defendant-appellee.

Appeal from the United States District Court for the District of Idaho.

Before: CANBY, and T.G. NELSON, Circuit Judges, and SHUBB,* District Judge.

Opinion

Opinion by Judge T.G. NELSON.

OPINION

T.G. NELSON, Circuit Judge:

I.

OVERVIEW

Gary and Carol Wallis appeal the district court's grant of summary judgment dismissing Wallis' claims for retaliatory discharge under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e, *et seq.*, age discrimination under the Age Discrimination in Employment Act (ADEA), *887 29 U.S.C. § 621, *et seq.*, and various state law claims.1 We affirm.

II.

FACTS AND PROCEDURAL HISTORY

Gary Wallis (Wallis) was hired in 1982 by J.R. Simplot Company (Simplot) as Director of Human Resources. Early in his tenure, a female employee of Simplot made a charge of sexual harassment against a vice-president of Simplot. Wallis supported her in her claim by transferring her to another division. Later, a second employee was discharged by the vice-president for his support of the woman in the harassment claim. Wallis rehired this discharged employee for his own staff and made supportive public statements on behalf of the employee. These events occurred sometime during 1983, 1984 and 1985.

In late 1989 and early 1990, Gordon Smith (Smith), president of Simplot, decided to decentralize the human resources department so that it would function at the company's division level. Smith informed Wallis of the decision in June 1990. At that time, and on occasions thereafter, Smith told Wallis that Simplot would find a "new role" for him and that he would not be "hurt by the decentralization process."

On September 12, 1990, Smith sent Wallis a letter terminating his employment. Wallis contends his termination closely followed his presentation to Smith of a

copy of a speech which he intended to give at an annual meeting of Simplot's management personnel. He contends that this speech was critical of Simplot's employment practices, and that his discharge was in retaliation for this proposed speech. On the basis of these allegations, Wallis filed suit in state court alleging violations of Title VII, the ADEA, and various state law claims. Simplot removed the case to federal district court.

The district court granted summary judgment for Simplot on all claims as it saw them on February 12, 1992. Wallis moved for reconsideration of the judgment, claiming he had pleaded a claim of retaliatory discharge which had not been addressed by the district court. Although the complaint did not clearly allege this claim, the district court considered the retaliatory discharge claim, and on July 7, 1992, it entered a second summary judgment adverse to Wallis on that claim also.

On July 15, 1992, Wallis moved the district court to alter or amend the second summary judgment pursuant to Fed.R.Civ.P. 59. Then, on August 4, 1992, Wallis filed a notice of appeal, appealing both summary judgments. Finally, on January 6, 1993, the district court entered an order denying the motion to alter or amend the second summary judgment.

III.

JURISDICTION

[1] At the time Wallis filed his notice of appeal, Rule 4(a)(4)[2] plainly stated that a notice of appeal filed during the pendency of a motion to alter or amend the judgment "shall have no effect." The Supreme Court, in *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 61, 103 S.Ct. 400, 403, 74 L.Ed.2d 225 (1982), held that a notice of appeal filed during the pendency of a Rule 59 motion is a nullity, as if no notice of appeal were filed at all. However, Rule 4(a)(4) was amended effective December 1, 1993,[3] to provide ***888** that when a notice is prematurely filed, it "shall be in abeyance, and shall become effective upon the date of entry of an order that disposes of the last of all such motions." Under the old version of Rule 4(a)(4), applicable at the time Wallis filed the notice of appeal, the notice was a nullity. Thus, the issue becomes whether the notice may be resurrected by a retroactive application of the amended version of Rule 4(a)(4). *See Leader Nat'l Ins. Co. v. Industrial Indemnity Ins. Co.,* 19 F.3d 444, 445 (9th Cir.1994) (applying amended Rule retroactively); *Burt v. Ware,* 14 F.3d 256, 258 (5th Cir.1994) (holding amended rule applies retroactively unless it would work injustice).

The Supreme Court's order adopting the 1993 amendments to the Rules of Appellate Procedure provides:

> That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 1993, and shall govern all proceedings in appellate cases thereafter commenced and, *insofar as just and practicable, all proceedings in appellate cases then pending.*

61 U.S.L.W. 5365 (U.S. Apr. 27, 1993) (emphasis added). Wallis' appeal was pending on December 1, 1993; thus, if the application of the 1993 amendment to this case is "just and practicable," we have jurisdiction.

The parties briefed this case and were prepared to argue it as though the notice of appeal were valid. Simplot cannot claim prejudice because it did not discover the defect in the filing of the notice of appeal until this court ordered supplemental briefing on the issue of jurisdiction after the case had already been set for oral argument. To allow the parties to proceed to present the appeal they have been working on since August 1992 is just. Further, practicality is no problem. No adjustments in briefing schedules or in calendaring of oral argument were required in order to address the issues raised by the parties.

Under the circumstances of this case, we hold that it is "just and practicable" to apply the amended version of Rule 4(a)(4) to this case. Therefore, we have jurisdiction to consider the appeal.

IV.

STANDARD OF REVIEW

"We review the district court's grant of summary judgment *de novo* to determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Sengupta v. Morrison–Knudsen Co.,* 804 F.2d 1072, 1074 (9th Cir.1986). We do not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 2510–11, 91 L.Ed.2d 202 (1986). The record below is examined to determine whether there is any basis for affirmance. *Lowe v. City of Monrovia,* 775 F.2d 998, 1007 (9th Cir.1985), *as amended,* 784 F.2d 1407 (1986). If the result reached by the district court is correct, we will affirm even if the district court

relied on an erroneous ground. *Id.*

V.

RETALIATORY DISCHARGE AND AGE DISCRIMINATION

We combine the Title VII and ADEA claims for analysis because the burdens of proof and persuasion are the same.4 *See* ***889** *Rose v. Wells Fargo & Co.,* 902 F.2d 1417, 1420 (9th Cir.1990) ("The shifting burden of proof applied to a Title VII discrimination claim also applies to claims arising under ADEA."). The basic allocation of burdens and order of presentation of proof for such claims follows three steps:

> [A] plaintiff must first establish a *prima facie* case of discrimination. If the plaintiff establishes a *prima facie* case, the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its employment decision. Then, in order to prevail, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory.
> *Lowe,* 775 F.2d at 1005.

[2] The requisite degree of proof necessary to establish a *prima facie* case for Title VII and ADEA claims on summary judgment is minimal and does not even need to rise to the level of a preponderance of the evidence. *See Yartzoff v. Thomas,* 809 F.2d 1371, 1375 (9th Cir.1987), *cert. denied,* 498 U.S. 939, 111 S.Ct. 345, 112 L.Ed.2d 309 (1990). The plaintiff need only offer evidence which "gives rise to an inference of unlawful discrimination." *Lowe,* 775 F.2d at 1005 (quotation omitted). "The amount [of evidence] that must be produced in order to create a *prima facie* case is 'very little.' " *Sischo–Nownejad v. Merced Community College Dist.,* 934 F.2d 1104, 1111 (9th Cir.1991); *see also, Lowe,* 775 F.2d at 1009. "Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981).

[3] The *prima facie* case may be based either on a presumption arising from the factors such as those set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973), or by more direct evidence of discriminatory intent. *Lowe,* 775 F.2d at 1009. In offering a *prima facie* case, of course, a plaintiff may present evidence going far beyond the minimum requirements.

[4] Once a *prima facie* case has been made, the burden of production shifts to the defendant, who must offer evidence that the adverse action was taken for other than impermissibly discriminatory reasons. *Burdine,* 450 U.S. at 254, 101 S.Ct. at 1094. Once the defendant fulfills this burden of production by offering a legitimate, nondiscriminatory reason for its employment decision, the *McDonnell Douglas* presumption of unlawful discrimination "simply drops out of the picture." *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, ——, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993).

[5] The question before us is whether, after these steps have been taken, a summary judgment for the defendant employer can be sustained. We are convinced that, as in any other summary judgment situation, the question can only be answered in each case by a review of the actual evidence offered by each party, to see whether a genuine issue of material fact has been presented for trial. If a rational trier of fact could, on all the evidence, find that the employer's action was taken for impermissibly discriminatory reasons, summary judgment for the defense is inappropriate. Before we analyze the record in this case, however, we deal with some of the more categorical arguments offered by the parties.

Wallis relies on our decision in *Sischo–Nownejad,* 934 F.2d at 1104, for the proposition that summary judgment for the employer is never appropriate after the plaintiff makes out a *prima facie* case. In that case, we noted:

> Even if the defendant articulates a legitimate, nondiscriminatory reason for the challenged employment decision, thus shifting the burden to the plaintiff to prove that the articulated reason is pretextual, summary judgment is normally inappropriate. When a plaintiff has established a *prima facie* inference of disparate treatment through direct or circumstantial evidence of discriminatory intent, he will *necessarily* have raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer's articulated reason for its employment decision.

***890** *Id.* at 1111 (internal quotations and citations omitted). However, we went on to state:

> [I]n evaluating whether the defendant's articulated reason is pretextual, the trier of fact must, at a minimum, consider the same evidence that the plaintiff introduced to establish her *prima facie*

> case. When that evidence, direct or circumstantial, *consists of more* than the [*prima facie*] presumption, a factual question will almost always exist with respect to any claim of nondiscriminatory reason.

Id. (internal citation omitted) (emphasis added). *Sischo–Nownejad,* thus, read as a whole, stands for the proposition that in deciding whether an issue of fact has been created about the credibility of the employer's nondiscriminatory reasons, the district court must look at the evidence supporting the *prima facie* case, as well as the other evidence offered by the plaintiff to rebut the employer's offered reasons. And, in those cases where the *prima facie* case consists of no more than the minimum necessary to create a presumption of discrimination under *McDonnell Douglas,* plaintiff has failed to raise a triable issue of fact.

Thus, the mere existence of a *prima facie* case, based on the minimum evidence necessary to raise a *McDonnell Douglas* presumption, does not preclude summary judgment. Indeed, in *Lindahl v. Air France,* 930 F.2d 1434, 1437 (9th Cir.1991), we specifically held "a plaintiff cannot defeat summary judgment simply by making out a prima facie case." "[The plaintiff] must do more than establish a prima facie case and deny the credibility of the [defendant's] witnesses." *Schuler v. Chronicle Broadcasting Co.,* 793 F.2d 1010, 1011 (9th Cir.1986). In response to the defendant's offer of nondiscriminatory reasons, the plaintiff must produce "specific, substantial evidence of pretext." *Steckl v. Motorola, Inc.,* 703 F.2d 392, 393 (9th Cir.1983). In other words, the plaintiff "must tender a genuine issue of material fact as to pretext in order to avoid summary judgment." *Id.*

Wallis' assertion, that once a plaintiff makes out a *prima facie* case summary judgment is impermissible, is untenable. His position would require a trial in every discrimination case, even where no genuine issue of material fact exists concerning the legitimacy of the employer's nondiscriminatory reasons. Such a result is not compelled by *Sischo–Nownejad* and would be contrary to other cases affirming summary judgment where the plaintiff failed to produce evidence of intentional discrimination. *See Federal Deposit Ins. Corp. v. Henderson,* 940 F.2d 465, 473 n. 16 (9th Cir.1991) (distinguishing *Lowe* and *Sischo–Nownejad*); *Lindahl,* 930 F.2d at 1437 (requiring more than mere *prima facie* case); *Schuler,* 793 F.2d at 1011; (requiring more than *prima facie* case and denial of credibility of employer's witnesses); *Steckl,* 703 F.2d at 393 (failing to produce any facts, which if believed, would have shown pretext).

There are a number of recent cases in other circuits that have required plaintiffs to come forth with evidence sufficient to permit a rational trier of fact to find the employer's explanation to be pretextual; the mere fact that a bare *prima facie* case had been made out was not in itself sufficient. *See Davis v. Chevron U.S.A.,* 14 F.3d 1082, 1087 (5th Cir.1994) (failing to present more than mere refutation of employer's legitimate nondiscriminatory reason for not hiring); *Durham v. Xerox Corp.,* 18 F.3d 836, 340 (10th Cir.1994) (failing to offer sufficient evidence to support finding that reason was pretext); *Anderson v. Baxter Healthcare Corp.,* 13 F.3d 1120, 1124 (7th Cir.1994) (requiring plaintiff to produce evidence from which rational fact finder could infer employer lied); *Mitchell v. Data Gen. Corp.,* 12 F.3d 1310, 1316 (4th Cir.1993) (requiring evidence creating factual dispute about nondiscriminatory reason); *Geary v. Visitation of the Blessed Virgin Mary,* 7 F.3d 324, 332 (3rd Cir.1993) (failing to offer facts showing genuine issue of fact as to reason); *LeBlanc v. Great Am. Ins. Co.,* 6 F.3d 836, 843 (1st Cir.1993) (requiring evidence sufficient for fact finder to reasonably conclude discriminatory motive), *cert. denied,* 511 U.S. 1018, 114 S.Ct. 1398, 128 L.Ed.2d 72 (1994). We hold that, when evidence to refute the defendant's legitimate explanation is totally lacking, summary judgment is appropriate even though plaintiff may have established a minimal *prima facie* ***891** case based on a *McDonnell Douglas* type presumption.

We now turn to the specific facts of this case to determine whether Wallis met his requisite burden to overcome summary judgment. Generally, to establish a *prima facie* case of an ADEA violation, the plaintiff must show he was:

(1) a member of a protected class [age 40–70];

(2) performing his job in a satisfactory manner;

(3) discharged; and

(4) replaced by a substantially younger employee with equal or inferior qualifications.

Rose, 902 F.2d at 1421. Proof of the replacement element is not always required, however. Where the discharge results from a reduction in work force, the plaintiff may show "through circumstantial, statistical or direct evidence that the discharge occurred under circumstances giving rise to an inference of age discrimination." *Id.* Such an inference can be established by showing the employer had a "continuing need for his skills and services in that his various duties were still being performed." *Id.* (quoting *Leichihman v. Pickwick Int'l,* 814 F.2d 1263, 1270 (8th Cir.), *cert. denied,* 484 U.S. 855, 108 S.Ct. 161, 98 L.Ed.2d 116 (1987)); *see also Washington v. Garrett,* 10 F.3d 1421, 1434 (9th Cir.1993) (*prima facie* case established by

proving others not in employee's protected class were treated more favorably).

The first three elements of the *prima facie* case are not contested by Simplot. Regarding the fourth element, Wallis claimed that twelve of the thirteen functions he performed were retained at the corporate level, and that all his duties were assigned to persons younger and less qualified than he. Wallis was not replaced because his position was eliminated; instead, current employees of Simplot assumed Wallis' duties. In this respect, Wallis' claim is more analogous to a reduction in force situation which does not require proof of replacement, but allows alternative proof of an inference of age discrimination. Because very little evidence is required to establish a *prima facie* case, we conclude he has met this burden.

We also find Wallis met his minimal burden of establishing a *prima facie* case for a Title VII claim. Proof of a *prima facie* case of retaliatory discharge requires a showing that:

(1) he was engaged in a protected activity;

(2) he was thereafter subjected by his employer to an adverse employment action; and

(3) a causal link exists between the protected activity and the adverse employment action.

Yartzoff, 809 F.2d at 1375.

Wallis contends his proposed speech, which he intended to give at an annual meeting of Simplot's management personnel and which he shared with Smith, constituted a protected activity.5 Further, he contends he was discharged in retaliation for the proposed speech. The district court held the speech was not a protected activity because it was not critical of Simplot's actions. It read Wallis' proposed speech as merely setting forth perceptions of the company gained directly from employees during a recent facilities tour and providing suggestions to management on how to counter or ameliorate the adverse employee views expressed during the tour.

The district court's view of the speech is supportable. When viewed in the context of the tour and Wallis' responsibilities, it can be fairly interpreted as not critical of Simplot, but simply descriptive of problems which employees relayed to Wallis. However, there are some isolated passages which can be read as critical of Simplot, and Smith may have possibly interpreted the speech as critical. Therefore, we disagree with the district court and hold that Wallis established a *prima facie* case of retaliatory discharge.

***892** Accordingly, because Wallis established *prima facie* cases to support his Title VII and ADEA claims, the burden shifts to Simplot to offer a legitimate, nondiscriminatory reason for Wallis' termination. Simplot offers such a reason. In response to Wallis' claims, Simplot asserts Wallis was not terminated because of his age or in retaliation for the proposed speech. Instead, Simplot claims Wallis' termination was a result of its decision to decentralize the human resources function, and as a result of this decentralization, Wallis' supervisory duties were assumed by others at the corporate level, and the human resources function was moved to the division level. Because Simplot offers this legitimate, nondiscriminatory reason for Wallis' termination, it has carried its burden of production, and the presumptions created by the *prima facie* cases disappear. *See Hicks,* 509 U.S. at ——, 113 S.Ct. at 2749. This is true even though there has been no assessment of the credibility of Simplot at this stage. *Id.; Burdine,* 450 U.S. at 254, 101 S.Ct. at 1094.

The presumptions having dropped out of the picture, we are left with the ultimate question of whether Wallis has offered evidence sufficient to permit a rational trier of fact to find that Simplot intentionally discriminated against him because of his age or retaliated against him for his proposed speech. *See Hicks,* 509 U.S. at ——, 113 S.Ct. at 2749. In determining whether there is a triable issue of fact, we must consider all the evidence, including that offered to establish the *prima facie* cases and to rebut Simplot's reason as pretextual together with any other evidence.

Wallis' response to Simplot's nondiscriminatory reason is merely that the functions he performed continue to be performed by other Simplot employees and that supervisory duties remained at the corporate level which is the same proof he offered to establish his *prima facie* case. Wallis offers no additional proof of age discrimination either direct, circumstantial or statistical.6 Further, he offers no additional proof of a retaliatory motive. Wallis' response that other employees assumed his duties merely serves to reinforce the Simplot's explanation for his termination: the company was decentralizing Wallis' function and downsizing by requiring other employees to assume his duties. In essence, Wallis has simply showed that an adverse employment decision was made under conditions that permitted him to invoke a *McDonnell Douglas* type of presumption of unlawful discrimination. That evidence, although it sufficed to establish a minimal *prima facie* case, is not enough now that Simplot has offered a nondiscriminatory explanation, and nothing in Wallis' evidence controverts it. Because Wallis failed to present any evidence to refute Simplot's legitimate, nondiscriminatory reason for his discharge, we hold Wallis failed to carry his burden of establishing a triable issue of fact on the ultimate question of whether Simplot

intentionally discriminated or retaliated against him.

Accordingly, we AFFIRM the district court's grant of summary judgment in favor of Simplot.

64 Fair Empl.Prac.Cas. (BNA) 1507, 65 Fair Empl.Prac.Cas. (BNA) 1216, 65 Fair Empl.Prac.Cas. (BNA) 1881, 64 Empl. Prac. Dec. P 43,074, 28 Fed.R.Serv.3d 1464

Parallel Citations

Footnotes

* Honorable William B. Shubb, United States District Judge for Eastern District of California, sitting by designation.

1 This court affirms the district court's grant of summary judgment with respect to Wallis' state law claims in a separate, unpublished decision.

2 The version of Rule 4(a)(4) in effect at the time of Wallis' appeal stated:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party ... under Rule 59 ..., the time for appeal of all parties shall run from the entry of the order denying ... such motion. *A notice of appeal filed before the disposition of [such motion] shall have no effect.* A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.

Fed.R.App.P. 4(a)(4) (emphasis added).

3 A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal until the date of the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file an amended notice of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

4 Wallis also makes a claim under the Idaho Human Rights Act (IHRA), I.C. § 67–5901, et seq. The Idaho Supreme Court has held the analysis under Title VII applies to claims under IHRA. *See Hoppe v. McDonald,* 103 Idaho 33, 644 P.2d 355, 358 (1982). *See also Sengupta v. Morrison–Knudsen Co., Inc.,* 804 F.2d 1072, 1077 (9th Cir.1986). Accordingly, our decision resolving Wallis' Title VII claim also resolves his IHRA claim.

5 Wallis also contends his support of a female employee who brought a sexual harassment claim against a Simplot executive and of another employee who supported her in this claim was a protected activity. We need not resolve this issue, however, because Wallis concedes these events occurred sometime during 1983, 1984 and 1985, and were not in close proximity to his termination.

6 After summary judgment on Wallis' ADEA claim, Wallis moved for reconsideration of the judgment under Rule 59. In support of the motion, Wallis' lawyer submitted an affidavit showing the ages of various people terminated by Simplot prior to Wallis' termination. No attempt was made to show why this information was not presented at the summary judgment hearing; Wallis did not claim the evidence was unavailable to him at the time of summary judgment. The district court denied the motion for reconsideration without comment. Implicit in its denial was the rejection of the tardy affidavit. This rejection was well within the district court's discretion. The district court is required only to consider the tardy affidavit if it constituted "newly discovered evidence" within the meaning of Rule 59. *See Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.,* 833 F.2d 208, 211 (9th Cir.1987). Evidence is not newly discovered if it was in the party's possession at the time of summary judgment or could have been discovered with reasonable diligence. *See id.* at 212. We similarly decline to accept the tardy affidavit.

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146 Idaho 667
Supreme Court of Idaho,
Boise, December 2008 Term.

Joe C. WATERMAN, Plaintiff–Appellant,
v.
NATIONWIDE MUTUAL INSURANCE COMPANY and Allied Insurance Company, Defendants–Respondents.

No. 33883. | Jan. 22, 2009.

Synopsis

Background: Former employee brought action against employer alleging violation of the Age Discrimination in Employment Act of 1967. After jury returned a verdict in favor of employee, awarding him $700,000.00 in damages, the Fourth Judicial District Court, Ada County, D. Duff McKee, J., granted employer's motion for directed verdict and entered judgment for employer. Employee appealed.

Holdings: The Supreme Court, W. Jones, J., held that:
[1] two stray comments that employer was a "young company" were insufficient to establish a discriminatory intent on the part of employer;
[2] there was no evidence of a nexus between alleged adverse employment actions and a discriminatory intent, as required to support claim; and
[3] employer was not entitled to attorney fees on appeal.

Affirmed.

West Headnotes (14)

[1] **Appeal and Error**
⇐Extent of Review Dependent on Nature of Decision Appealed from
Appeal and Error
⇐Appeal from Ruling on Motion to Direct Verdict

In reviewing a decision to grant or deny a motion for directed verdict or a judgment notwithstanding the verdict (JNOV), Supreme Court applies the same standard as that applied by the trial court when originally ruling on the motion.

2 Cases that cite this headnote

[2] **Appeal and Error**
⇐Extent of Review Dependent on Nature of Decision Appealed from
Appeal and Error
⇐Appeal from Ruling on Motion to Direct Verdict

When reviewing a decision to grant or deny a motion for directed verdict or a judgment notwithstanding the verdict (JNOV), Supreme Court conducts an independent review of the evidence and does not defer to the trial court's findings.

2 Cases that cite this headnote

[3] **Trial**
⇐Substantial Evidence
Trial
⇐Hearing and Determination

When ruling on a motion for directed verdict, court must determine whether, admitting the truth of the adverse evidence and drawing every legitimate inference most favorably to the opposing party, there exists substantial evidence to justify submitting the case to the jury.

[4] **Trial**
⇐Substantial Evidence

The substantial evidence test for a directed verdict, i.e., whether substantial evidence exists to justify submitting the case to the jury, requires only that the evidence be of sufficient quantity and probative value that reasonable minds could conclude that a verdict in favor of the party against whom the motion is made is proper.

1 Cases that cite this headnote

[5] **Courts**
Construction of Federal Constitution, Statutes, and Treaties

Federal law guides state Supreme Court in its interpretation of federal Age Discrimination in Employment Act of 1967 claims. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[6] **Civil Rights**
Practices Prohibited or Required in General; Elements
Civil Rights
Discharge or Layoff

To establish an age discrimination claim under the Age Discrimination in Employment Act of 1967, employee had to demonstrate that he was a member of a protected class, meaning an employee at least 40 years of age, that he was performing his job in a satisfactory manner, that he was discharged or his employer took adverse employment action against him, and that his position was filled by a younger person of equal or lesser qualifications. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[7] **Civil Rights**
Motive or Intent; Pretext

There was no evidence of a nexus between the alleged adverse employment actions of which employee complained, including that he did not receive adequate training, had insufficient knowledge of company merger, was assigned an overwhelming number of claims, performed the work of a two adjustor job, was forced to use two computers, and had to work in intolerable conditions, and age discrimination as a motivating factor, as required to support an Age Discrimination in Employment Act of 1967 claim; employer attempted to work with employee so he could gradually return to his job, employer offered to help employee find another position within company after he complained about his new position, and employer made a good faith offer for employee to participate in company's rehiring process after his benefits were set to expire. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[8] **Labor and Employment**
Constructive Discharge

Under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes.

2 Cases that cite this headnote

[9] **Labor and Employment**
Constructive Discharge

The inquiry under the constructive discharge doctrine is objective: whether working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign.

2 Cases that cite this headnote

[10] **Civil Rights**
Motive or Intent; Pretext

Two stray comments that employer was a "young company" were insufficient to establish a discriminatory intent on the part of employer, in Age Discrimination in Employment Act of 1967 case, where employee failed to put these comments into context and did not produce evidence of the intent behind the comments. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

§ 12–121.

[11] **Civil Rights**
Disparate Treatment

When a plaintiff alleges disparate treatment by an employer in an Age Discrimination in Employment Act of 1967 case, liability depends on whether the protected trait, age, actually motivated the employer's decision. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[12] **Civil Rights**
Disparate Treatment

Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.

[13] **Civil Rights**
Weight and Sufficiency of Evidence

Stray remarks are insufficient to establish discrimination.

[14] **Costs**
Nature and Form of Judgment, Action, or Proceedings for Review

Employee's appeal from district court's grant of employer's motion for directed verdict after jury awarded employee $700,000 in damages was not brought frivolously, and thus employer was not entitled to attorney fees on appeal. West's I.C.A.

Attorneys and Law Firms

**642 Kirkendall Law Office and Law Offices of Peter Desler, PC, Boise, for appellant. Peter Desler argued.

Moffatt, Thomas, Barrett, Rock & Fields, Chartered, Boise, for respondent. Patricia M. Olsson argued.

Opinion

W. JONES, Justice.

*669 NATURE OF CASE

Joe Waterman (Appellant) brought an action against his former employer, Nationwide Mutual Insurance Company and Allied Insurance Company (collectively Respondent). Although Appellant initially filed several causes of action, the case proceeded to trial only on Respondent's alleged violation of the Age Discrimination in Employment Act of 1967 (ADEA). After the jury returned a verdict in favor of Appellant, awarding him $700,000.00 in damages, the district court granted Respondent's motion for directed verdict. Appellant brings this appeal requesting this Court to reverse the district court's directed verdict ruling and to reinstate the jury verdict in his favor.

FACTUAL AND PROCEDURAL BACKGROUND

Nationwide hired Appellant in 1979 as an insurance claims adjustor and gave him "pretty intense" training during his first six months on the job. Appellant was the sole Nationwide adjustor in the Boise area until approximately 1993, at which time the number of claims in the Boise area increased and Nationwide hired a second adjustor. Until that time, Appellant handled multiline claims, including homeowner, auto, property damage, and bodily injury and liability investigations. After the second adjustor was hired, Appellant's responsibility was limited to property damage claims. In 2000, the second adjustor left the Boise office, but Appellant continued to handle property damage claims exclusively until 2001, which is when the alleged adverse employment actions commenced.

Nationwide purchased Allied Group Inc. in October 1998. The two companies began integrating in 2000. Prior to the merger, Nationwide used the Class software system to handle claims and Allied used the Passport software system. Mike Lex (Mr. Lex), Allied's Regional Vice–President, testified that he was in charge of transitioning the companies to one common claims handling software system. He testified that the company chose to convert all claims handling processes to the Allied Passport model to achieve the goal of a lower loss expense ratio.

Mr. Lex also testified he was part of the team that determined which adjustors would be retained after the merger. To accomplish this task, all employees were required to fill out a Technical Background Update explaining their technical competency and prior performance. In July of 2000, Appellant filled out a Technical Background Update wherein he listed 21.5 years experience in auto and property damage claims and 15 years experience in med pay, bodily injury, litigation, general liability and personal injury protection.

**643 *670 From June through October 2000, Appellant received a weekly company publication entitled "Up to Date: An Integration Update for Nationwide's Western States Claims Associates," which answered in-depth questions about the merger. Appellant first learned in early October of 2000 that he would have a position with the company after the merger as a multiline adjustor. Appellant testified that his supervisor never physically handed him a job description, but he also admitted that such materials were available online for review.

Prior to the merger, Appellant worked out of an office, but in December 2000, he was required to move his office into his house. Appellant was expected to settle the Nationwide claims that existed prior to the merger on the Nationwide software system while simultaneously transitioning to the new Allied software system. This required Appellant to set up two separate computers in his home office because the Allied and Nationwide software systems could not run on the same computer. DSL1 was not available at Appellant's home office at that time, so he had to use a dial-up line and completely shut down one computer and boot up the other computer any time that he needed to change between the two software systems. Appellant mentioned that the company gave another adjustor a switch that allowed her to go quickly and easily from one program to another. Appellant requested such a switch but was denied. Appellant testified that the company indicated "it's only a matter of time before you are done with the pending claims on Class and it's not within our affordability to do that."

The parties dispute when Appellant began processing Allied claims. Appellant argues it was on January 1, 2001; Respondent claims it was not until February 2001. Either way, Appellant testified that the increased number of claims overwhelmed him and his requests for help went unanswered. However, Respondent put on evidence that Appellant was not meeting the company's expectations for workload or timeliness. On February 4, 2001, Appellant was given a verbal warning for failure to comply with claims handling criteria. In March 2001, Respondent attempted to help Appellant by creating an action plan to improve his performance.

Appellant argues that he did not receive proper training on the Allied Passport system. He testified that he attended two meetings in Denver, his boss visited him once in Boise, and he spent a few days job shadowing an adjustor in Colorado. Appellant stated that Respondent failed in each situation to provide him even the most basic training that would be required for him to perform the job adequately. However, on May 2, 2001, during a conference call between Appellant and his supervisors that was set up to discuss Appellant's performance issues, Appellant indicated to Nita Dunn, Respondent's human resources consultant, that a lack of training was not the reason for his poor performance:

> Dunn: And it is not because, if I understand you correctly it is not because you feel that uh you haven't received enough training or that you don't have the proper tools to do your job. But simply that the workload is too heavy.
>
> Waterman: Correct.

On May 22, 2001, Appellant agreed to a work improvement plan that called for Appellant to become compliant with Respondent's claims handling standards by 50% within one month and 75% within three months. Around this time Appellant requested a severance package from Respondent, which Respondent denied, stating "your request for consideration of a severance option was unusual, as your position with Allied has not been eliminated."

From June 4, 2001 through June 14, 2001, Appellant went on a preplanned vacation. Immediately following his vacation, Appellant took leave under the Family and Medical Leave Act (FMLA) due to depression and his doctor's advice not to work for four to six months. Appellant received a letter dated September 5, 2001 stating that his FMLA leave was exhausted and "based on business *671 **644 needs, a decision has been made to restaff your position. This decision does not reflect on your ability to do your job, but rather the company's need to ensure the job gets done despite your absence." On September 6, 2001, Respondent posted a position for a

Boise area claims adjustor. On September 17, 2001, Appellant was specifically told that his position had not yet been restaffed and that he should try a gradual return to work, but he refused, stating he did not believe he could ever return to a normal workload. On September 24, 2001, Respondent filled the position with Tamyra Gent, age 41.

As of the date Appellant's FMLA leave expired, Respondent placed him on long-term disability and he received approximately 60% of his salary. Appellant was subsequently found not to be disabled after an independent medical examination was conducted. On April 27, 2002, Respondent reinstated Appellant's full salary for two months and advised Appellant to search for a new job within the company, but there were no positions available in Boise and Appellant was not willing to relocate. Appellant was 51 years old as of his last day of employment with Respondent.

On July 24, 2004, Appellant filed a Complaint and Demand for Jury Trial against Respondent asserting various causes of action that primarily focused on age discrimination. Respondent filed an Answer, essentially denying the allegations made by Appellant and raising the following affirmative defenses, among others: defendant's actions were taken for legitimate, non-discriminatory reasons and without regard to plaintiff's age, plaintiff failed to take advantage of preventative or corrective opportunities provided by defendant or to otherwise avoid harm, and defendant acted in good faith in applying policies of which plaintiff was aware when he was hired and during his employment. The jury trial commenced on December 13, 2006, and lasted four days.

During trial, Appellant presented testimony by a claims director that he was aware of "some statements made in group meetings where Allied was referred to as a young company." However, the claims director did not know what the statements meant. Appellant also presented testimony of a district claims manager that, in reference to a conversation with his supervisor about a job applicant who was in his sixties, his supervisor stated to him, "Well, you know, Allied is a young company." The inference was that the job applicant was too old for the position, but he was ultimately hired.

After Appellant rested his case, Respondent moved for directed verdict, alleging Appellant failed to establish a *prima facie* case of age discrimination because a reasonable person could not find the second, third, or fourth elements of an ADEA claim. The district court denied Respondent's motion for directed verdict, but noted that Respondent could renew its motion at the end of trial. Respondent then presented its defense case.

On December 20, 2006, both sides rested and Respondent renewed its motion for directed verdict. The court took it under advisement. The jury returned a 9–3 verdict in favor of Appellant and awarded $700,000.00 in damages. After the district court dismissed the jury, Respondent again renewed its motion for directed verdict. The court granted the motion, stating, "I've considered this carefully. I fully expected the jury to take me off the hook on this, but they have not. I'm satisfied that the plaintiff has failed to establish the requisite elements and that a properly deliberative jury could not have reached the verdict that they did." On December 21, 2006, the court issued its written Ruling on Motion for Directed Verdict. On December 27, 2006, the court entered judgment against Appellant and in favor of Respondent. There is no evidence in the record that either party requested or received attorney fees below. Appellant brought this appeal seeking reinstatement of the jury verdict in the amount of $700,000.00, plus interest. Respondent requests attorney fees on appeal.

ISSUES ON APPEAL

1. Did the district court err in granting Respondent's motion for directed verdict?[2]

**645 *672 2. Is Respondent entitled to attorney fees on appeal?

STANDARD OF REVIEW

[1] [2] [3] [4] In reviewing a decision to grant or deny a motion for directed verdict or a judgment notwithstanding the verdict, this Court applies the same standard as that applied by the trial court when originally ruling on the motion. *Gunter v. Murphy's Lounge, LLC,* 141 Idaho 16, 27, 105 P.3d 676, 687 (2005) (citation omitted). This Court conducts an independent review of the evidence and does not defer to the trial court's findings. *Id.* This Court must determine whether, admitting the truth of the adverse evidence and drawing every legitimate inference most favorably to the opposing party, there exists substantial evidence to justify submitting the case to the jury. *Id.* The substantial evidence test does not require the evidence be uncontradicted. *Id.* It requires only that the evidence be of sufficient quantity and probative value that reasonable minds could conclude that a verdict in favor of the party against whom the motion is made is proper. *Id.*

[5] [6] Federal law guides this Court in its interpretation of ADEA claims. *See O'Dell v. Basabe,* 119 Idaho 796, 811, 810 P.2d 1082, 1097 (1991) (citations omitted). Different

jurisdictions, both within and outside the state of Idaho, recite the elements of an ADEA claim differently. To establish an age discrimination claim for the purposes of this case, Appellant must first demonstrate that he was a member of a protected class, which here is an employee at least 40 years of age. 29 U.S.C. § 631(a); *Wallis v. J.R. Simplot Co.,* 26 F.3d 885, 891 (9th Cir.1994). Second, he must demonstrate that he was performing his job in a satisfactory manner. *Peterson v. Hewlett–Packard Co.,* 358 F.3d 599, 603 (9th Cir.2004); *Wallis,* 26 F.3d at 891. Third, he must demonstrate that he was discharged or his employer took adverse employment action against him. *Id.* Fourth, he must demonstrate that his position was filled by a younger person of equal or lesser qualifications. *Wallis,* 26 F.3d at 891. In this case, the third element of Appellant's ADEA claim is dispositive, so we need not address elements one, two, or four.

ANALYSIS

The district court did not err in granting Respondent's motion for directed verdict.

[7] [8] [9] To establish the third element of Appellant's ADEA claim, he must prove he was discharged or Respondent took adverse employment action against him. In this case, Appellant contends he was constructively discharged. "Under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" *Poland v. Chertoff,* 494 F.3d 1174, 1184 (9th Cir.2007) (*quoting Penn. State Police v. Suders,* 542 U.S. 129, 141, 124 S.Ct. 2342, 2351, 159 L.Ed.2d 204, 216 (2004)). Under the adverse employment action doctrine, the United States Supreme Court has stated, "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 761, 118 S.Ct. 2257, 2268, 141 L.Ed.2d 633, 652–53 (1998) (*comparing Crady v. Liberty Nat. Bank & Trust Co. of Ind.,* 993 F.2d 132, 136 (7th Cir.1993) ("A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation"), with *Flaherty v. Gas Research Institute,* 31 F.3d 451, 456 (7th Cir.1994) (a "bruised ego" is not enough), *Kocsis v. Multi–Care Management, Inc.,* 97 F.3d 876, 887 (6th Cir.1996) (demotion without change in pay, benefits, duties, or prestige ***673 **646** insufficient), and *Harlston v. McDonnell Douglas Corp.,* 37 F.3d 379, 382 (8th Cir.1994) (reassignment to more inconvenient job insufficient)).

[10] [11] [12] [13] When a plaintiff alleges disparate treatment by an employer in an ADEA case, "liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 141, 120 S.Ct. 2097, 2105, 147 L.Ed.2d 105, 116 (2000) (*quoting Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610, 113 S.Ct. 1701, 1706, 123 L.Ed.2d 338, 346 (1993)). Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome. *Id.* Stray remarks are insufficient to establish discrimination. *Nesbit v. Pepsico, Inc.,* 994 F.2d 703, 705 (9th Cir.1993) (*citing Merrick v. Farmers Ins. Group,* 892 F.2d 1434, 1438 (9th Cir.1990)). To establish the nexus between Respondent's allegedly discriminatory motive and the third element of Appellant's ADEA claim, Appellant cites to two stray comments that Nationwide–Allied was a "young company." Appellant failed to put these comments into context and did not produce evidence of the intent behind the comments, thus the stray comments are insufficient to establish a discriminatory intent.

Furthermore, there is no substantial evidence in the record that Appellant was constructively discharged or that Respondent took adverse employment action against him. Appellant presented evidence at trial that he was not happy with his new position after the merger and his responsibilities changed in a way he found unpleasant. However, he failed to establish a nexus between the alleged adverse employment actions of which he complains and any iota of evidence that age discrimination was a motivating factor. Appellant claims he satisfied this element of his ADEA claim by producing evidence at trial that he did not receive adequate training, he had insufficient knowledge of the merger, he was assigned an overwhelming number of claims, he performed the work of a two adjustor job, he was forced to use two computers, and he had to work in intolerable conditions. However, Respondent presented evidence that Appellant specifically denied training was an issue, he was not trained differently than other employees, his claim load was within normal limits, there is no evidence that Appellant did the work of two adjustors, the computer set-up in Appellant's home was nothing more than a temporary annoyance, and Appellant was on notice of the merger as early as February

2000 and kept advised of the merger by weekly updates. Moreover, Respondent attempted to work with Appellant so he could gradually return to his job, offered to help him find another position within the company after he complained about his new position, and made a good faith offer for him to participate in the company's rehiring process after his benefits were set to expire.

Appellant essentially requests this Court to overturn the district court's entry of directed verdict based on conjecture and speculation that two stray comments provide sufficient evidence of discriminatory animus on the part of Respondent. We decline to do so. Accordingly, we affirm the district court's entry of directed verdict against Appellant.

Respondent is not entitled to attorney fees on appeal.

[14] Respondent requests attorney fees on appeal pursuant to IC § 12–121. Attorney fees can be awarded on appeal under IC § 12–121 only if the appeal was brought or defended frivolously, unreasonably, or without foundation. *Teton Peaks Inv. Co., LLC v. Ohme,* 146 Idaho 394, 399, 195 P.3d 1207, 1212 (2008). We cannot say Appellant frivolously brought this appeal where the jury found in favor of Appellant, awarded $700,000.00 in damages, and the district court thereafter entered directed verdict against Appellant. Thus, we deny Respondent's request for attorney fees on appeal.

CONCLUSION

After drawing every legitimate inference in favor of Appellant, we find Appellant did not produce substantial evidence to establish the third element of this ADEA claim. ***674** ****647** Therefore, we affirm the district court's decision to grant Respondent's motion for directed verdict. We deny Respondent's request for attorney fees on appeal. Costs to Respondent.

Justices BURDICK, J. JONES, HORTON and Justice pro tem WALTERS, concur.

Parallel Citations

201 P.3d 640, 105 Fair Empl.Prac.Cas. (BNA) 556

Footnotes

1 "DSL" is shorthand for "digital subscriber line," which is a speedy medium for transferring data over regular phone lines and can be used to connect to the Internet. *See* The Tech Terms Computer Dictionary, http:// www.techterms.com/definition/dsl (last visited Dec. 5, 2008).

2 After the jury returned the verdict, Respondent should have moved for judgment notwithstanding the verdict rather than renew its motion for directed verdict. *See* I.R.C.P. § 50. However, the two motions are reviewed under the same standard and for the purposes of this case any distinction between the motions is without a difference.

End of Document

94 F.3d 353
United States Court of Appeals, Seventh Circuit.

Martin T. WOHL, Plaintiff-Appellant,
v.
SPECTRUM MANUFACTURING, INC., Defendant-Appellee.

No. 95-3610. \| Argued April 18, 1996. \| Decided Aug. 28, 1996. \| Rehearing and Suggestion for Rehearing En Banc Denied Nov. 21, 1996.

Employee brought Age Discrimination in Employment Act (ADEA) action against his former employer. The United States District Court for the Northern District of Illinois, James B. Zagel, J., entered summary judgment for employer, and appeal was taken. The Court of Appeals, Eschbach, Circuit Judge, held that: (1) employee established that he met employer's legitimate expectations so as to establish prima facie case of discrimination, and (2) material issue of fact as to whether employer's proffered reasons for firing employee were pretext for age discrimination precluded summary judgment for employer.

Reversed and remanded.

Bauer, Circuit Judge, filed dissenting opinion.

West Headnotes (9)

[1] **Federal Courts**
Trial De Novo

Court of Appeals reviews de novo district court's grant of summary judgment. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[2] **Federal Courts**
Summary Judgment

When reviewing district court's grant of summary judgment, Court of Appeals views record in the light most favorable to nonmovant. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

1 Cases that cite this headnote

[3] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Court applies summary judgment standard rigorously in employment discrimination cases because intent and credibility are crucial issues.

49 Cases that cite this headnote

[4] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Age Discrimination in Employment Act (ADEA) plaintiff may defeat employer's summary judgment motion if plaintiff produces evidence that employer proffered phoney reasons for firing plaintiff. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

7 Cases that cite this headnote

[5] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

To defeat employer's summary judgment motion, ADEA plaintiff had to raise genuine issue of material fact regarding sincerity of employer's proffered reasons for plaintiff's discharge. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

5 Cases that cite this headnote

[6] **Federal Civil Procedure**

Employees and Employment Discrimination, Actions Involving

Material issue of fact as to whether employer's proffered reasons for firing employee were pretext for age discrimination precluded summary judgment for employer on employee's ADEA claims. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Fed.Rules Civ.Proc.Rule 56, 18 U.S.C.A.

4 Cases that cite this headnote

[7] **Civil Rights**
Discharge or Layoff

General elements of prima facie case of age discrimination are that plaintiff was in a protected class, plaintiff performed well enough to meet employer's legitimate expectations, plaintiff was discharged, and employer sought replacement for plaintiff. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

1 Cases that cite this headnote

[8] **Civil Rights**
Discharge or Layoff

Employee established that he met employer's legitimate expectations so as to establish prima facie case of age discrimination; employer gave employee substantial raise just before he was fired and employer provided no documentary evidence that employee did not meet its legitimate expectations. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

3 Cases that cite this headnote

[9] **Civil Rights**
Prima Facie Case

Prima facie case of employment discrimination is a flexible standard that is not intended to be rigidly applied.

7 Cases that cite this headnote

Attorneys and Law Firms

***354** Aron D. Robinson, Bruce J. Goodhart, Matthew H. Berns (argued), Holstein, Mack & Klein, Chicago, IL, for plaintiff-appellant.

Terry J. Smith, Barry C. Kessler (argued), Kessler, Smith & Powen, Chicago, IL, for defendant-appellee.

Before BAUER, ESCHBACH, and FLAUM, Circuit Judges.

Opinion

ESCHBACH, Circuit Judge.

Plaintiff-Appellant Martin Wohl was hired as Controller of Defendant-Appellee Spectrum Manufacturing, Inc., in 1988. In 1992, at the age of 54, Wohl was fired and replaced by Joe Holloway, who is approximately 20 years younger than Wohl. Wohl then filed suit against Spectrum, alleging that Spectrum fired him because of his age, in violation of the Age Discrimination in Employment Act, as amended, 29 U.S.C. § 621 et seq. ("ADEA").

Spectrum filed a motion for summary judgment. The court analyzed Wohl's claim under the indirect, burdenshifting method of proof first established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and later applied to ADEA claims. *See McCoy v. WGN Continental Broadcasting Co.,* 957 F.2d 368, 371 (7th Cir.1992); *see also Anderson v. Baxter Healthcare Corp.,* 13 F.3d 1120, 1122-24 (7th Cir.1994) (discussing the particulars of the burden-shifting approach). The court found (or, more appropriately, presumed) that Wohl had made a prima facie case for age discrimination. The court also found that Spectrum had met its burden of rebutting the presumption of age discrimination by articulating a legitimate, nondiscriminatory reason for its action. The court, therefore, required Wohl to prove that Spectrum's "reasons" for firing Wohl were a pretext for age discrimination. The court held that Wohl failed to raise a genuine issue of material fact and the court granted Spectrum's motion for summary judgment. Wohl appeals

from that decision, arguing that he raised a genuine issue of material fact as to whether Spectrum's proffered reason for his firing was a ***355** lie. We agree with Wohl and we reverse and remand for further proceedings.

I.

[1] [2] [3] We review *de novo* the district court's grant of a motion for summary judgment, *Schultz v. General Electric Capital Corp.,* 37 F.3d 329, 333 (7th Cir.1994), *cert. denied sub nom. Alley v. General Electric Capital Corp.,* 515 U.S. 1145, 115 S.Ct. 2584, 132 L.Ed.2d 833 (1995), and we view the record in the light most favorable to the non-moving party. *McCoy,* 957 F.2d at 369. We apply the summary judgment standard rigorously in employment discrimination cases such as this because intent and credibility are crucial issues. *Courtney v. Biosound,* 42 F.3d 414, 419 (7th Cir.1994).1

[4] [5] A plaintiff in an age discrimination case may defeat a summary judgment motion brought by the employer if the plaintiff produces evidence that the employer proffered a phony reason for firing the employee. *Anderson,* 13 F.3d at 1123. The Supreme Court's opinion in *Saint Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), specifically permits, but does not require, the fact-finder "to infer the ultimate act of intentional discrimination" based upon such evidence. *Id.* at 511, 113 S.Ct. at 2749. Therefore, to avoid summary judgment, Wohl must raise a genuine issue of material fact regarding the sincerity of the proffered reasons for his discharge. With this framework in mind, we discuss the relevant facts in the instant case.

II.

Spectrum is a small manufacturing company that makes specialized machine parts. Wohl had a variety of responsibilities as Spectrum's Controller. These responsibilities included financial and cost accounting, payroll, coordination of liability insurance and administration of the company's 401K plan.

Shortly after Wohl was hired, he investigated and purchased a new computer accounting program at the company's behest for approximately $3,000. Spectrum eventually outgrew this system and Wohl was directed to assess the purchase of a more sophisticated system that would permit management to track profitability by department and job lot. Wohl and Spectrum's president, James Ceriale, opted for a software accounting system called "DCD." The company purchased the DCD software and the hardware necessary to implement the program at a cost of slightly more than $100,000.

The company opted for this system because it was capable of sophisticated cost accounting. Cost accounting requires the company and its employees to input the variable costs associated with a single job (*i.e.*, materials, labor, and machine overhead) along with proportionate fixed costs (general overhead and administration). These figures are then matched against billing for each job. The resultant analyses provide the company with detailed information regarding the company's efficiency, productivity, and sources of profit and loss. This system, like all computer systems and all accounting systems, is dependent on the input of accurate information. For example, the system requires production floor employees to log on to a computer terminal and input their personal identification number and a job account number before working on a particular job with a particular machine. The employee signs off after completing that period of work. If the information that the employee enters is inaccurate, the output data will be inaccurate. Garbage in, garbage out.

[6] In its motion for summary judgment, Spectrum suggested that it had fired Wohl for two reasons: (1) his failure to "get along with" general manager Greg Reuhs and (2) his inability to produce certain computer accounting reports-specifically, computer-generated job costing reports from the DCD system. The district court found that these were legitimate, nondiscriminatory reasons for Wohl's termination. The court also found that Wohl had failed to create a genuine issue of material fact regarding whether ***356** Spectrum's second reason2 was false-a pretext for age discrimination. Wohl admits that he did not produce accurate and reliable job costing reports for Spectrum. This is, however, only half of the story. Wohl alleges that general manager Greg Reuhs was responsible for the system's failure. Wohl also claims that he complained to Spectrum's management about Reuhs's actions and that Spectrum's management instructed him to get along with, and defer to, Reuhs. This allegation is significant because, if true (and we must assume for purposes of summary judgment that it is true), it creates a genuine issue of material fact regarding whether Spectrum's proffered reason for firing Wohl was a pretext for age discrimination.

The evidence indicates that Wohl and Reuhs had clashed early on in Wohl's tenure at Spectrum. Reuhs was primarily responsible for manufacturing, but he had assumed responsibility in a number of other areas and was given great deference by Spectrum's management. For example, Reuhs insisted on taking responsibility for billing, an area that ordinarily belongs under the supervision of the Controller. When Spectrum first hired

Wohl, Wohl had questioned some of the billing practices maintained by Reuhs. Reuhs had an unorthodox policy of keeping particular jobs open and refusing to abide by a standard month-end cutoff. By employing this unorthodox policy, Reuhs was able to manipulate department profitability and "steal" billing from, and allocate labor to, subsequent months. Reuhs's sleight of hand prevented management from obtaining an accurate picture of department profit and loss.

Reuhs's tinkering with billing so concerned Wohl that he brought the matter to Spectrum's management's attention. Wohl informed Jim Ceriale, Tom Brandseth, and William Fricke about his concerns at a luncheon meeting. Ceriale, Brandseth, and Fricke were the founders and managers of the company and Ceriale was its president. At this luncheon meeting, Wohl was specifically directed to "get along with" Reuhs and to work out their differences. Wohl stated that it was clear to him "that the company considered Reuhs, who was the younger man, to be a key player in the organization, and that he was to be appeased." Following the meeting, Wohl learned to get along with Reuhs and performed his duties to the fullest extent without clashing with Reuhs.

As part of his duties in implementing the DCD system, Wohl was responsible for setting up the computer with certain fixed information, including overhead, employee identification numbers and employees' rates of pay. Wohl entered this information but was unable to produce the desired reports because production floor employees were supposed to supply much of the variable cost data, but did not do so accurately. Wohl did not have authority to manage these production floor employees; the employees were supervised by Greg Reuhs. The reports were unreliable because these employees failed to enter the correct data. Reuhs further compromised the integrity of the reports by failing to close out completed jobs and deliberately manipulating the billing cut-off dates.

The facts create a genuine issue of material fact with respect to both of Spectrum's proffered reasons for firing Wohl. First, Wohl claims that he learned to "get along with" Reuhs. Wohl's claim that he learned to "get along with" Reuhs is corroborated by Spectrum's own outside accountant, Charles Gries. Gries testified at his deposition that "Greg [Reuhs] never felt that he had a problem with Mr. Wohl" and that Reuhs "was always very complimentary of him." The evidence is more than sufficient to create a genuine issue of material fact. Especially when looked at in the light most favorable to plaintiff, a reasonable jury could find that Wohl and Reuhs got along fine and that Spectrum did not fire Wohl for failing to get along with Reuhs.

Second, Wohl has raised a genuine issue of material fact regarding Spectrum's second reason, failing to produce accurate and reliable computer reports. A reasonable jury could find that Spectrum's second reason was false because Spectrum knew that Reuhs's actions prevented Wohl from implementing ***357** the DCD system,[3] yet Spectrum failed to take any action to monitor or alter Reuhs's management of the production floor employees and failed to take action to prevent Reuhs from manipulating data to produce artificially good results. In fact, Wohl had summoned sufficient courage to bring his specific concerns regarding Reuhs's behavior to the highest level of management, but Spectrum's only response was to tell Wohl to get along with Reuhs. That Spectrum claimed that it fired Wohl for failing to "get along with" Reuhs further lends credence to Wohl's claim that Spectrum preferred him to defer to Reuhs rather than rocking the boat in order to obtain accurate data from the production floor employees.

Wohl's claim is distinct from a simple attempt to pass the buck on responsibility for producing DCD reports to Reuhs. *See Schultz v. General Electric Capital Corp.*, 37 F.3d 329, 334 (7th Cir.1994) (simply shifting the blame for a problem does not establish pretext). Wohl claims that Spectrum *knew* it was firing the wrong employee all along and pointed to the DCD system as an after-the-fact excuse. *Collier v. Budd Co.*, 66 F.3d 886, 893 (7th Cir.1995) (pretext established for summary judgment by evidence that employer did not honestly believe its proffered reason); *Courtney v. Biosound, Inc.*, 42 F.3d 414, 423 (7th Cir.1994) ("Given the conflicting evidence, a reasonable juror could conclude that [defendant] did not honestly believe that [plaintiff] was responsible for the mishap, but only claimed that the mishap was plaintiff's fault as an excuse not to hire him.").[4] Wohl's claim "create [s] an issue as to whether [Spectrum] honestly believes in the reasons it offers, not whether [Spectrum] made a bad decision." *Sample v. Aldi, Inc.*, 61 F.3d 544, 549 (7th Cir.1995) (citation and internal quotation marks omitted); *see also* ***358** *Schultz*, 37 F.3d at 334 (noting that evidence that employer *knew* that its reason for firing employee was based on erroneous or irrelevant information is distinct from evidence that merely shows that the employer made a mistake and would permit a fact-finder to find that the employer lied).

Wohl points to a number of additional factors that support his claim that Spectrum's proffered reasons were a pretext for age discrimination: Spectrum's files contain no indication of any disciplinary action or informal concern with Wohl's performance and Wohl received a 25 percent pay raise less than 6 months before he was fired; Wohl provided substitute reports using less-sophisticated software that Spectrum's outside accountant, Gries,

admitted "were very good" and were more than sufficient to generate the company's year-end financial statements; and Wohl's "replacement," Holloway, experienced the same problems as Wohl in implementing the DCD system because Reuhs refused to adopt a standard billing cut-off and was unwilling to get cooperation from the production employees. These facts all support Wohl's contention that his failure to produce accurate and reliable reports was not the true reason that he was fired. We recognize that a reasonable fact-finder may infer contrary conclusions, but we reemphasize that all reasonable inferences must be viewed in the light most favorable to the non-moving party on summary judgment.

[7] [8] The facts also support the conclusion that Wohl had established a *prima facie* case, the first step in the burdenshifting method of proof. The general elements of a *prima facie* case of age discrimination are that: (1) plaintiff was in the protected class, (2) plaintiff performed well enough to meet the employer's "legitimate expectations," (3) plaintiff was discharged, and (4) the employer sought a replacement for plaintiff. *Anderson,* 13 F.3d at 1122. Spectrum concedes that plaintiff established three of the four elements. Spectrum suggests, however, that summary judgment was appropriate in this case even if it lied about its reasons for firing Wohl because Wohl did not meet Spectrum's legitimate expectations. We disagree.

Spectrum gave Wohl a substantial raise just before he was fired, Wohl produced financial reports as best he was able, and Spectrum provides no documentary evidence that Wohl did not meet their legitimate expectations. Plaintiff also stated in his affidavit that "[u]ntil I was fired, I had every reason to believe that the company was happy with my performance. I was never given any indication that Spectrum considered my efforts at implementing DCD to be deficient." *See Courtney,* 42 F.3d at 418 ("The nonmoving party's own affidavit or deposition can constitute affirmative evidence to defeat a summary judgment motion."); *Mechnig v. Sears, Roebuck & Co.,* 864 F.2d 1359, 1365 n. 7 (7th Cir.1988) (quoting *Williams v. Williams Electronics,* 856 F.2d 920, 923 n. 6 (7th Cir.1988), for the proposition that plaintiff may establish that he performed the job well enough to meet the employer's legitimate expectations based solely upon plaintiff's own testimony regarding the quality of his work). This is essentially a swearing contest. Summary judgment is not the appropriate place to resolve this *genuine* dispute over a material fact.

[9] Finally, Spectrum's claim that it fired Wohl for failure to get along with Reuhs also cuts against Spectrum's suggestion that Wohl did not perform well enough to meet Spectrum's "legitimate expectations."[5] Spectrum argues that Wohl cannot establish that he met Spectrum's legitimate expectations because "Plaintiff admitted he failed to perform key elements of his job, *i.e.*, the production of job costing reports through ***359** implementation of DCD." Yet, there was an inherent tension between "getting along" with Greg Reuhs and compiling accurate and reliable information relating to job costing reports. Wohl pointed out this tension to Spectrum's management. Management indicated to Wohl that appeasing Reuhs should be his priority. Thus, Spectrum's expectations regarding the DCD system and the production of accurate and reliable reports are not "legitimate" unless they are viewed in isolation. "The prima facie case ... is a flexible standard that is not intended to be rigidly applied." *Collier,* 66 F.3d at 890 (internal quotation and citation omitted). Spectrum's "legitimate" expectations must include a balancing of priorities: The expectation that Wohl produce the DCD reports must be balanced against Spectrum's stated expectation that Wohl get along with Reuhs. Summary judgment is inappropriate because Wohl has produced sufficient evidence that he met all of Spectrum's "legitimate expectations."

III.

Wohl has established a prima facie case for age discrimination and a trier of fact could reasonably conclude that Spectrum's proffered reasons for firing Wohl were false. Thus, Wohl has established a genuine issue of material fact. The district court's grant of summary judgment in favor of Spectrum is therefore REVERSED and REMANDED.

BAUER, Circuit Judge, dissenting.

I respectfully dissent. The opinion states: "Wohl admits that he did not produce accurate and reliable job costing reports for Spectrum. This is, however, only half of the story. Wohl alleges that general manager Greg Reuhs was responsible for the system's failure. Wohl also claims that he complained to Spectrum's management about Reuhs' actions and that Spectrum's management instructed him to get along with, and defer to, Reuhs. This allegation is significant because, if true (and we must assume for purposes of summary judgment that it is true), it creates a genuine issue of material fact regarding whether Spectrum's proffered reason for firing Wohl was a pretext for age discrimination."

I simply cannot accept this. The brief of appellant Wohl accurately reflects the complaint he made about Reuhs. Wohls' affidavit says that he questioned Reuhs' practices

as "manipulating department profitability" and "preventing management from seeing a true picture of department profit and loss." The affidavit recites that Wohl brought this matter to the attention of Spectrum management early on in his tenure, within 6 to 9 months after he was hired, "*even before DCD was implemented.*" This was at the luncheon when Wohl was "specifically told to get along with and defer to Reuhs." There is nothing in the record to support the statement that "Spectrum knew that Reuhs' actions prevented Wohl from implementing the DCD system...." The complaint about Reuhs from Wohl came many months before the DCD system was purchased.

The fact is, the DCD system was put to work-satisfactorily-by Reuhs' successor. Wohl, who acknowledged in his deposition that it was his responsibility to implement the DCD equipment, also acknowledged that he was never capable of utilizing the $100,000 DCD to provide accurate and reliable costing reports for Spectrum. There is nothing to suggest that Spectrum was told by Wohl that the DCD problem was caused by some hanky-panky or shortcomings of Reuhs'-Wohl's beef about Reuhs was long before the company even acquired the DCD and *that* complaint could not possibly be considered as creating a fact question as to whether Spectrum's proffered reason was a pretext for age discrimination.

There is simply no way of stretching a statement, "I didn't do what the company expected but it wasn't my fault," into an age discrimination claim. I do not know, nor is it significant in terms of this law suit, whether Reuhs was a terrible supervisor or Wohl a malcontent. Wohl admits that he didn't produce "accurate and reliable job costing reports for Spectrum." That provides the basis for the firing and not any implication of age discrimination.

And, in passing, I hesitate to join an opinion that would force a company to pause ***360** before giving a pay raise to an employee lest it be used to create an element of job tenure that cannot be overcome in the event the employee bogs down and the company wishes to fire him or her. Giving an incentive pay raise to stimulate work is not unknown nor is it even suspicious. (Both Reuhs and Wohl received 25 percent pay raises.) The stimulus was a failure; three months later the job costing reports were still not produced. All of this is uncontroverted. Whether Wohl couldn't produce the work because he was inept or couldn't produce the work because it was Reuhs' fault is immaterial; the company believed-and Wohl admitted-that he couldn't do what the job required and so he got fired. And when Reuhs couldn't do it, he got fired.

The record in this case, in the best light for the plaintiff, should not survive a motion for a directed verdict for the defendant if the case is tried. Whether Wohl agreed with the decision of the company to give him the gate and keep Reuhs and whether we agree with that business decision, is not relevant to the proceeding. I would affirm.

Parallel Citations

71 Fair Empl.Prac.Cas. (BNA) 1081

Footnotes

1 This is not to say that there is a hierarchy of the rigor with which we review cases on summary judgment. There is one summary judgment standard and we apply it rigorously in all cases. It is, however, of particular import in cases that turn on intent and credibility.

2 The district court never reached the issue whether Wohl had raised a genuine issue of material fact regarding Wohl's relationship with Reuhs.

3 The dissent hangs its hat on its belief that Wohl's complaints about Reuhs's billing practices cannot create a question of material fact as to whether Spectrum's proffered reason was a lie. The dissent claims that "[t]here is nothing in the record to support the statement that 'Spectrum knew that Reuhs' actions prevented Wohl from implementing the DCD system ...,' " noting that Wohl complained about Reuhs's phony billing practices before DCD was purchased. The dissent's position is untenable for two reasons. First, there is nothing unusual about inferring knowledge of a later fact (Reuhs' refusal to input accurate DCD data) from awareness of an earlier fact (Reuhs' refusal to input accurate data prior to purchase of the DCD). Furthermore, Wohl specifically raised this issue of fact. *See, e.g., Plaintiff's Local Rule 12(n) Response to Defendant's Statement of Facts in Support of Summary Judgment*, at para. 7 ("Answering further, Plaintiff alleges that Spectrum management *was at all times aware of the true reasons for the problems with the reports* and simply elected to back Reuhs, the younger man they viewed to be the future of the company ...." (emphasis added)). As evidentiary support, Wohl cites to a Spectrum memo contained in the record:

> The new computer system will be used for Accounts payable, check preparation, and general Ledger starting July 1st. Sometime during July Greg [Reuhs] will start recording all work performed on jobs on the new system and go off the old system for that purpose. We should be able to start generating invoices off of the new system shortly thereafter.

Nowhere does Spectrum claim that it was unaware of Reuhs's actions. On summary judgment we review the record in the light

most favorable to Wohl and draw all reasonable inferences in his favor. There is clearly enough evidence to create a factual issue whether Spectrum knew that Greg Reuhs was responsible for the inability to produce accurate DCD reports.
Second, the dissent ignores the fact that Wohl complained to Spectrum management that Reuhs was rigging the billing system to create a pleasing, but inaccurate, picture of department of profit and loss and *Spectrum's only response was to instruct Wohl to get along with Reuhs.* Spectrum's response supports an inference that they knew that Reuhs was responsible for the DCD reports because Spectrum's failure to stop the practice indicated that Spectrum actually condoned Reuhs's billing data high jinks. Spectrum not only had knowledge of Reuhs's actions, they also authorized his actions. If Wohl had continued to conflict with Reuhs, Spectrum would have had a legitimate reason to fire him. The record reflects that Wohl chose to get along with Reuhs. Under the dissent's view of the matter, there would be no such thing as a pretext, because the company could always instruct an employee to satisfy two mutually exclusive mandates. Heads I win, tails you lose. We do not support such a position.

4 The dissent states that "[t]here is simply no way of stretching a statement, 'I didn't do what the company expected but it wasn't my fault,' into an age discrimination claim." The dissent ignores the facts and tells only half the story. Wohl's claim is that "I didn't do what the company expected but it wasn't my fault *and the company knew it wasn't my fault but fired me anyway*!"

5 The dissent states that "[t]he fact is, the DCD system was put to work-satisfactorily-by Reuhs' successor" in apparent support of its position that the company's reason for firing Wohl were legitimate. The full facts of the case, however, support Wohl's position. Joe Holloway, Wohl's replacement, did not have *immediate* success in implementing the DCD system. Initially, he experienced the same problems as Wohl, that is, Reuhs's refusal to adopt standard billing practices and his failure to get appropriate input from production floor employees. Holloway did eventually produce accurate DCD reports, but only after Reuhs was fired in August 1993, nine months after Wohl was terminated. Wohl maintains that management simply elected to back Holloway, who is even younger than Reuhs.

End of Document

Idaho Statutes

TITLE 12
COSTS AND MISCELLANEOUS MATTERS IN CIVIL ACTIONS

CHAPTER 1
COSTS

12-121. ATTORNEY'S FEES. In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

History:
[12-121, added 1976, ch. 349, sec. 1, p. 1158; am. 1987, ch. 263, sec. 2, p. 555.]

Idaho Statutes

TITLE 67
STATE GOVERNMENT AND STATE AFFAIRS

CHAPTER 59
COMMISSION ON HUMAN RIGHTS

67-5911. REPRISALS FOR OPPOSING UNLAWFUL PRACTICES. It shall be unlawful for a person or any business entity subject to regulation by this chapter to discriminate against any individual because he or she has opposed any practice made unlawful by this chapter or because such individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

History:
[67-5911, added 1982, ch. 83, sec. 5, p. 156; am. 2005, ch. 278, sec. 6, p. 877.]

Rule 41. Attorney fees on appeal.

(a) Application for Attorney Fees - Waiver. Any party seeking attorney fees on appeal must assert such a claim as an issue presented on appeal in the first appellate brief filed by such party as provided by Rules 35(a)(5) and 35(b)(5); provided, however, the Supreme Court may permit a later claim for attorney fees under such conditions as it deems appropriate.

(b) Oral Argument on Attorney Fees. At the time of oral argument of an appeal, the parties may present argument as to whether or not the party claiming attorney fees has a legal right thereto.

(c) Adjudication of Right to Attorney Fees. The Supreme Court in its decision on appeal shall include its determination of a claimed right to attorney fees, but such ruling will not contain the amount of attorney fees allowed.

(d) Amount of Attorney Fees. If the Court determines that a party is entitled to attorney fees on appeal, the party claiming attorney fees shall file a claim concurrently with, or as part of, the memorandum of costs provided for by Rule 40. The claim for attorney fees, which at the discretion of the court may include paralegal fees shall be accompanied by an affidavit setting forth the method of computation of the attorney fees claimed. Attorney fees may also include the reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing the party's case. The opposing party may object to the amount of attorney fees claimed in the same manner as provided for objections to a memorandum of costs in Rule 40. The Court shall determine the amount of attorney fees or remand this question to the district court or agency to hear additional evidence and determine the amount of attorney fees to be allowed. Upon the determination of the amount of attorney fees, the Clerk shall insert the amount thereof in the remittitur in the same manner as the Clerk inserts costs pursuant to Rule 40(f).

(e) Number of Copies. An original and six copies of the claim or memorandum for attorney fees, objections to attorney fees, and briefs in support of or in opposition thereto shall be filed with the Clerk of the Supreme Court.

(Adopted March 25, 1977, effective July 1, 1977; amended March 30, 1984, effective July 1, 1984; amended March 23, 1990, effective July 1, 1990.)

Rule 56(a). Summary judgment - For claimant.

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of twenty (20) days from the service of process upon the adverse party or that party's appearance in the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in that party's favor upon all or any part thereof. Provided, a motion for summary judgment must be filed at least 60 days before the trial date, or filed within 7 days from the date of the order setting the case for trial, whichever is later, unless otherwise ordered by the court.
(Amended March 28, 1986, effective July 1, 1986; amended June 15, 1987, effective November 1, 1987.)

Rule 56(b). Summary judgment - For defending party.
A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in that party's favor as to all or any part thereof. Provided, a motion for summary judgment must be filed at least 60 days before the trial date, or filed within 7 days from the date of the order setting the case for trial, whichever is later, unless otherwise ordered by the court.
(Amended March 28, 1986, effective July 1, 1986; amended June 15, 1987, effective November 1, 1987.)

Rule 56(c). Motion for summary judgment and proceedings thereon.
The motion, affidavits and supporting brief shall be served at least twenty eight (28) days before the time fixed for the hearing. If the adverse party desires to serve opposing affidavits the party must do so at least 14 days prior to the date of the hearing. The adverse party shall also serve an answering brief at least 14 days prior to the date of the hearing. The moving party may thereafter serve a reply brief not less than 7 days before the date of the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Such judgment, when appropriate, may be rendered for or against any party to the action. The court may alter or shorten the time periods and requirements of this rule for good cause shown, may continue the hearing, and may impose costs, attorney fees and sanctions against a party or the party's attorney, or both.
(Amended March 28, 1986, effective July 1, 1986; amended June 14, 1987, effective November 1, 1987.)

Rule 56(d). Case not fully adjudicated on motion for summary judgment.
If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights (Refs & Annos)
Subchapter VI. Equal Employment Opportunities (Refs & Annos)

42 U.S.C.A. § 2000e-2

§ 2000e-2. Unlawful employment practices

Currentness

(a) Employer practices

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor

organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C.A. § 781 et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if--

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group

because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if--

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws--

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had--

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to--

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28.

Credits

(Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109; Pub.L. 102-166, Title I, §§ 105(a), 106, 107(a), 108, Nov. 21, 1991, 105 Stat. 1074-1076.)

Notes of Decisions (9725)

Current through P.L. 112-104 (excluding P.L. 112-96 and 112-102) approved 4-2-12

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